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No. (1)

IN THE

Supreme Court of the United States

ROBERT GRADY JOHNSON,
Petitioner,

v.

MIKE MULLIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether judicial expansion of the scope of Oklahoma's felony murder statute to include a defendant not present and actively participating in the commission of the underlying felony violates a defendant's constitutional right to due process and conflicts with this Court's holding in *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

2. Whether the Tenth Circuit erred in holding that the Oklahoma Court of Criminal Appeals did not apply clearly established federal law unreasonably when it ruled that a rational jury could have found that all of the elements of felony murder were proven beyond a reasonable doubt.

3. Whether the trial court's limitation of petitioner's cross examination of a key government witness without a legitimate, competing interest violates petitioner's constitutional due process and confrontation rights and conflicts with this Court's holding in *Chambers v. Mississippi*, 410 U.S. 284 (1973).

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PETITION FOR A WRIT OF CERTIORARI

Robert Grady Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 505 F.3d 1128. The report and recommendation of the magistrate judge (App., *infra*, 66a) adopted by the Western District of Oklahoma (App., *infra*, 63a) is reported at 2006 WL 1804558. The decision of the Oklahoma Court of Criminal Appeals in *Johnson v. Oklahoma*, No. F-2002-918 (filed Dec. 2, 2003) (App., *infra*, 135a) is not reported.

JURISDICTION

The decision of the court of appeals was entered on October 26, 2007. The petition for rehearing was denied on November 26, 2007. App., *infra*, 185a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall deprive any person of life, liberty, or property, without due process of law * * *.

The Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d) (1996), provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as deter-

> mined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The applicable Oklahoma felony murder statute, Okla. Stat. tit. 21, § 791 (1981), provides in relevant part:

> A person * * * commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of * * * robbery with a dangerous weapon * * *.

Oklahoma's aider and abettor statute, Okla. Stat. tit. 21, § 701.7 B (1983), provides that:

> All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals.

STATEMENT

In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court held that a defendant's right to due process is violated by both vague statutory language and retroactive judicial expansion of a criminal statute. This case concerns how far a state court may go in expanding a criminal statute without violating the defendant's right to due process. Additionally, it raises the question of whether the Courts' decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973), holding that a trial court can only limit cross examination where there is a compelling, competing interest, retains precedential value.

On December 14, 1984, four people were killed during a robbery of the First State Bank of Chattanooga in

Geronimo, Oklahoma. It is undisputed that the FBI agents investigating the crime concluded that both the robbery and the murders were committed by one person, Jay Wesley Neill. C.A. App. X. at 3279, 3281-82. It is undisputed that the three adult survivors, who had a full view of the tiny, prefabricated building, saw only a single robber, positively identified as Jay Wesley Neill. C.A. App. VI at 1813 and 1818; C.A. App X at 3281. It is undisputed that the forensic evidence linked a single culprit to the scene of the crime—Jay Wesley Neill. C.A. App. VI at 2018-21. It is likewise undisputed that Mr. Neill has admitted to committing both the robberies and the murders by himself. *See Neill v. State*, 896 P.2d 537, 544 n. 2 (Okla. Crim. App. 1994).

Nevertheless, Mr. Neill's homosexual companion, petitioner Robert Grady Johnson (hereinafter "Johnson"), was convicted of felony murder for the same crime and is currently serving four life sentences without the possibility of parole.

A. THE ROBBERY

Sometime before 1:15 p.m. on April 14, 1984, Mr. Neill entered the First State Bank and attempted to cash a forged check.[1] When the three bank employees refused the check, Mr. Neill pulled a gun, forced them to lie face down on the ground, and stabbed them to death. Following the murders, four adult customers (one carrying a baby) came into the bank. Mr. Neill made them lie down next to the bank employees and, walking over to them one by one, shot the four adult customers. Three of the adult customers survived and testified to what happened. All three testified that they saw only one robber, and two of them positively identified the robber as Mr. Neill. C.A. App. VI at 1813 and 1818. None of the

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[1] Phone records show that a bank employee called to verify the check at 1:15 p.m. C.A. App. VI at 1860.

survivors identified Johnson or testified that Johnson was even near the bank that day.

Following the robbery, Mr. Neill returned to the apartment he shared with Johnson and told him what had happened. Johnson, in a display of terrible judgment, agreed to flee with Mr. Neill. At 2:30 p.m. the same day, Mr. Neill and Johnson flew to San Francisco, where they were apprehended 3 days later. Johnson fully cooperated with the investigation. He acknowledged that he had helped Mr. Neill acquire the handgun used in the robbery (although Johnson has consistently maintained Mr. Neill told him it was for protection) because Mr. Neill was too young under state law to purchase one. He acknowledged that, prior to the robbery, he knew Mr. Neill was going to try and cash a forged check—stealing money from a friend to finance a vacation. And he acknowledged that he was aware of what actually happened at the bank before he boarded the plane with Mr. Neill. Despite Johnson's cooperation and the absence of any evidence that Johnson had participated in the robbery or homicides, Johnson was charged with first degree murder with Mr. Neill and they were tried together in Oklahoma

B. THE FIRST TRIAL

In April 1985, Mr. Neill and Johnson were convicted of four counts of first degree murder, three counts of shooting with intent to kill, and one count of attempted shooting with intent to kill. *Neill v. State*, 827 P.2d 884, 885 (Okla. Crim. App. 1992). They were both sentenced to death. On appeal, the Oklahoma Court of Criminal Appeals held that their trial should have been severed. Accordingly, the court reversed their convictions and ordered that new, separate trials be held. Id. at 894.

C. THE RETRIAL

In July 1993, Johnson was tried a second time. Although Johnson was found not guilty of murder with malice aforethought, he was convicted on four counts of felony murder. The applicable felony murder statute provided that a person is guilty of felony murder if he was "in the commission of" a felony when "he takes the life of another person." Okla. Stat. tit. 21, § 791 (1981). At trial, the evidence demonstrated that Johnson was not at the bank, much less actively participating in the commission of a robbery, during the homicides. As the Tenth Circuit acknowledged, three competent adults with a full view of the bank testified at trial that they saw only one robber, positively identified as Jay Wesley Neill. App., *infra*, 13a. The Tenth Circuit also conceded that while there was ample evidence linking Jay Wesley Neill to the scene of the crime, no physical evidence "implicated Johnson as having been present during the robbery." *Id.* In fact, despite convicting Johnson of felony murder, the jury never reached the question of whether he was actively participating in the robbery, and it appears to have believed he was not at the bank at all. C.A. App. X at 3042 (transcript of testimony regarding jury foreman).

Moreover, when Johnson tried to demonstrate at trial that he could not have been at the bank, the trial court inexplicably cut off his right to cross examination. According to official, time stamped records, the robbery occurred at 1:15 p.m. Debbie Ward, Johnson's neighbor, had consistently testified that Johnson left her apartment after 1:00 p.m. on the day of the robbery. However, at Johnson's retrial, she testified that he left her apartment before 1:00 p.m. While it is theoretically possible, if unlikely, that Johnson could have made it to the bank, located 16 miles away, leaving before 1:00 p.m., it would have been impossible leaving after 1:00 p.m. *See* pp 24-

26, *infra*. When defense counsel attempted to refresh her recollection and establish Johnson's alibi, the trial court sustained an objection by the State and cut off inquiry into the issue. C.A. App. VI at 1913-14.

D. THE APPEAL

Johnson appealed his conviction, which was originally dismissed by the Oklahoma Court of Criminal Appeals on the grounds that Johnson's court-appointed counsel failed to timely file an appeal brief. Johnson then filed for a writ of habeas corpus in the United States District Court for the Western District of Oklahoma, claiming ineffective assistance of counsel. Although the district court denied the petition, the Tenth Circuit reversed, directing the district court to grant the writ conditioned upon the State of Oklahoma granting Johnson an appeal.

Johnson submitted his appeal brief to the Oklahoma Criminal Court of Appeals on April 1, 2003. App., *infra*, 186a. Johnson argued, *inter alia*, that (i) because the plain language of Oklahoma's felony murder statute and relevant case law limited the statute's application to a defendant actively participating in the underlying felony, an expansion of the statute's scope to cover a person not present and participating in the robbery would violate due process; (ii) under the evidence introduced at trial it was clear that Johnson was not at the bank and actively participating in the robbery; and (iii) the trial court's decision to limit Johnson's right to cross examination violated his rights to due process and confrontation. The Oklahoma Court of Criminal Appeals denied all relief on December 2, 2003. App., *infra*, 135a.

E. PROCEEDINGS ON FEDERAL HABEAS

Johnson filed a petition for a writ of habeas corpus in the District Court for the Western District of Oklahoma. Johnson argued, *inter alia*, that his incarceration violated the due process clause because no rational jury

could find that he was present and participating in the robbery, a requirement for felony murder. As Johnson concluded on page 22 of his principal brief:

> Under well-established Oklahoma law, as well as bedrock principles of the United States Constitution, Mr. Johnson was not eligible for a felony murder conviction unless the evidence showed beyond a reasonable doubt that he was present and participating in the Geronimo Bank murders at the time the deaths occurred. The record in this case shows just the contrary. According to the FBI and all of the evidence, Mr. Johnson was not present or participating in the Geronimo Bank robbery, and is therefore innocent of the felony murder charges for which he is serving four life sentences. Because no properly instructed jury could find him guilty beyond a reasonable doubt, his habeas petition should be granted, and his felony-murder convictions vacated.

Johnson also argued that, *inter alia*, his due process and confrontation rights were violated when the trial court cut off his cross examination of a key government witness. As Johnson stated on page 38 of his principal brief:

> The trial court deprived Mr. Johnson of his rights to confrontation and due process by refusing to allow his counsel to refresh Debbie Ward's recollection with her own sworn testimony in the trial of Jay Neill. This was a vital point, going to the central issue of whether it was even possible for Mr. Johnson to have been at the bank at the time of the crime. Nonetheless, Mr. Johnson's rights under the Fifth and Sixth Amend-

ments to the United States Constitution were unfairly cut off.

Following the submission of written briefs and documentary evidence, the magistrate judge recommended that a writ of habeas corpus be denied. App., *infra*, 66a. The district court issued an order accepting the recommendation and a judgment denying the petition for habeas corpus. App., *infra*, 63a-65a. Johnson noticed an appeal on July 24, 2006 and the Tenth Circuit issued a certificate of appealability on January 18, 2007.

On October 26, 2007, the Tenth Circuit affirmed the decision of the district court. The Tenth Circuit concluded that the felony murder statute, when combined with the aider and abettor statute, could apply to a defendant not present during the commission of the underlying felony without violating the defendant's due process rights. App., *infra*, 20a. The Tenth Circuit also held that a reasonable jury could have found on the evidence introduced at trial that Johnson was at the bank. App., *infra*, 6a. Finally, it concluded that the trial court's decision to cut off cross examination did not affect the outcome of the case. App., *infra*, 31a. The Tenth Circuit declined to rehear the case. App., *infra*, 185a.

REASONS FOR GRANTING THE PETITION

Under 28 U.S.C. § 2254(d), a habeas petitioner is entitled to relief if he can show either that the state court arrived at a conclusion opposite to a conclusion reached by the Court on a question of law, or that the facts of the case are materially indistinguishable from prior cases before the Court and the state court arrived at a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). Alternatively, a petitioner is entitled to relief if "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that

principle to the facts." *Id.* at 413. In this case, the Tenth Circuit erroneously agreed with the Oklahoma Court of Criminal Appeals on three related issues that warrant habeas relief.

First, the Oklahoma Court of Criminal Appeals held that, despite both its prior precedent and the clear language of the felony murder statute, Johnson could be found guilty of felony murder even if he was not present during, and participating in, the commission of the underlying felony. In order to expand the scope of the felony murder statute to reach Johnson, the Oklahoma Court of Criminal Appeals combined the felony murder statute with the aider and abettor statute. However, the felony murder statute had never before been read, on its own or in conjunction with the aider and abettor statute, to apply to people not actively participating in a felony during its commission. In effect, the Oklahoma Court of Criminal Appeals retroactively created a new criminal statute that it has applied exclusively to Johnson. The felony murder statute as construed by the Oklahoma Court of Criminal Appeals was not clear, specific or spelled out in advance, nor did it give Johnson fair warning of the conduct covered by the statute. *See Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (it is a "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime").

Second, the Oklahoma Court of Criminal Appeals held that there was sufficient evidence for a jury to find that Johnson was present during the bank robbery. As this Court previously determined, the evidence is not sufficient to sustain a conviction unless "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The evidence in the record in this case was insufficient to support a finding beyond a reasonable doubt that Johnson was present and

participating in the robbery. In fact, it conclusively establishes that he was not at the bank and participating in the robbery.

Third, while acknowledging that the trial court erred in limiting Johnson's right to cross examination, the Oklahoma Court of Criminal Appeals concluded that the limitation did not affect the outcome of the case. In reaching that conclusion, the Oklahoma Court of Criminal Appeals ignored *Chambers v. Mississippi*, 410 US 284 (1973), which was decided on similar facts. Not only did the trial court lack a legitimate interest in limiting Johnson's right to cross examination, but the issue on cross examination was the seminal issue in the case—whether Johnson was at the bank and participating in the commission of the robbery. Accordingly, the petition for a writ of certiorari should be granted.

I. JOHNSON'S INCARCERATION FOR FELONY MURDER VIOLATES HIS CONSTITUTIONAL RIGHT TO DUE PROCESS.

A. Both the Clear Language of the Felony Murder Statute and the Relevant Case Law Limit its Scope to a Person Actively Participating in the Commission of the Underlying Felony That Results in Death.

The decision of the Tenth Circuit conflicts with fundamental principles set forth by this Court in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). It is well established that a court cannot retroactively redefine criminal statutes to expand their scope. *Id.* at 352 (due process is violated by both "vague statutory language" and "retroactive judicial expansion of narrow and precise language"); *see also Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (criminal statutes may not be interpreted in a way that would constitute "an unforeseeable and retroactive judicial expansion of narrow and precise statutory

language"). "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decisions has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). The logic invoked by the Tenth Circuit in circumventing these established principles is contradicted by both the plain language of the statute and the controlling state-law decisional authority.

1. The Statute and Relevant Authority. The Oklahoma felony murder statute in effect at the time of the crime provided that:

> A person * * * commits the crime of murder in the first degree *when he takes the life* of a human being, regardless of malice, *in the commission of* * * * robbery with a dangerous weapon * * *.

Okla. Stat. tit. 21, § 791 (1981) (emphasis added). By its terms, the statute applies only to someone engaged in the commission of a robbery that results in a death. Because Johnson was not at the bank during the commission of the robbery, but was sitting 16 miles away in his apartment, he is not of guilty of felony murder under the plain language of the statute. *See United States v. Resnick*, 299 U.S. 207, 209 (1936) ("[s]tatutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used"); *United States v. Alpers*, 338 U.S. 680, 681 (1950). The Tenth Circuit's references to Johnson's conduct outside of the robbery—whether he helped Mr. Neill acquire a pistol before the robbery or traveled with Mr. Neill to San Francisco after the robbery—are irrelevant. Under the statutory language, the only question is whether Johnson was participating in a robbery while it was being committed and during which a person was killed.

That straightforward interpretation of the statute was the one repeatedly adopted by the Oklahoma Court of Criminal Appeals prior to Johnson's case. One year before Johnson's trial, the Oklahoma Court of Criminal Appeals emphasized that a person must be committing an act that is part of or inseparable from the robbery at the time of the homicide to satisfy the in the "commission of" element of felony murder. *See Stiles v. State*, 829 P.2d 984, 991 (Okla. Crim. App. 1992) ("A person is in the commission of [r]obbery with a [d]angerous [w]eapon when he is performing an act which is an inseparable part of a [r]obbery with a [d]angerous [w]eapon, or which is necessary in order to complete the course of conduct constituting a [r]obbery [w]ith a [d]angerous [w]eapon, or when he is fleeing from the immediate scene of a [r]obbery [w]ith a [d]angerous [w]eapon"). Unless the person is present and providing assistance during the felony, there is no evidence that the defendant assented to the killing in connection with the crime. *See Turner v. State*, 477 P.2d 78, 84 (Okla. Crim. App. 1970). ("no one can be properly convicted of a crime to the commission of which he had never expressly or impliedly given his assent" and that assent can be inferred where "the accused is present and aiding and abetting another in its commission").

The Oklahoma Court of Criminal Appeals had also held that a defendant must be involved in some act essential to the commission of the underlying felony at the time the homicide occurs to be guilty of felony murder. *See Franks v. State*, 636 P.2d 361, 365 (Okla. Crim. App. 1981), ("*At the time of the killing*, the accused must be engaged in some act which is required for the full execution of that underlying crime, and the killing must be the consequence of that crime") (emphasis added) overruled on other grounds, *Brown v. State*, 743 P.2d 133 (Okla. Crim. App. 1987); *Diaz v. State*, 728 P.2d

503, 509 (Okla. Crim. App. 1986), ("*at the time of the homicide*, the accused must be engaged in some act which is required to complete the underlying felony") (emphasis added). Because Johnson was not engaged in an act integral to the completion of the robbery while the robbery was being committed, he cannot be guilty of felony murder.

2. **The Tenth Circuit's contrary ruling is unfounded.** In denying habeas relief, the Tenth Circuit ruled that (i) the due process argument was not exhausted before the Oklahoma Court of Criminal Appeals, and (ii) two earlier cases provided Johnson with sufficeint notice of the change in scope of the statute. App., *infra*, 22a.

The first conflict is without merit. Johnson's brief to the Oklahoma Court of Criminal Appeals clearly raised his due process argument. As Johnson stated on page 22 of his brief:

> It is well established that a criminal statute must be clear and specific, and must spell out in advance the conduct to which it applies. *See, e.g., Wright v. Georgia*, 373 U.S. 284, 83 S. Ct. 1240, 10 L.Ed.2d 349 (1963). Due process requires that a defendant have adequate notice of the penalties that attach to his conduct. *Id.*; *see also Gall v. Parker*, 231 F.3d 265, 305 (6th Cir. 2000). * * * To hold for the first time in Oklahoma history—in the face of the plain language of the Oklahoma felony murder statute and contrary to all of the cases construing that statute—that a defendant can be convicted of felony murder without proof that he was actively engaged in the commission of the underlying felony would clearly violate these principles.

App., *infra*, 196a.

The Tenth Circuit's claim regarding prior case law construing the felony murder statute is likewise unfounded. The Tenth Circuit claims that *Lewis v. State*, 451 P.2d 399 (Okla. Crim. App. 1967), and *Chaney v. Brown*, 730 F.2d 1334 (10th Cir. 1984), combined the felony murder statute with Oklahoma's aider and abettor statute, Okla. Stat. tit. 21, § 701.7 B (1983), to reach defendants not present during and participating in the underlying felony. Not so. In *Lewis*, the defendant was present and participating in the robbery by driving the getaway car. Courts have always held that getaway drivers are active participants—a person present at the scene of a crime, acting as a lookout, and providing the means of escape is clearly an integral part of the robbery and performing a task necessary for its completion. In contrast, Johnson was sitting in an apartment miles away from the robbery and providing no assistance to Mr. Neill whatsoever. A getaway driver assents to and joins the murder with his presence and assistance during the robbery, but Johnson did not provide any such assent. *See Turner v. State*, 477 P.2d 78, 84 (Okla. Crim. App. 1970). (assent can be inferred from the defendant's participation in an underlying felony where "the accused is present and aiding and abetting another in its commission"). No court has ever applied the Oklahoma felony murder to facts even remotely close to this case.

Chaney likewise does not support the Tenth Circuit's decision. The defendant in *Chaney* was directly involved in a kidnapping that resulted in the death of the victim. *Chaney*, 730 F.2d at 1350. However, he argued on appeal that it was one of his co-defendants who actually killed the kidnapped victim. As the Tenth Circuit noted, because the defendant was actively involved in the underlying felony, it was irrelevant whether he was the one who pulled the trigger—he was present during and

participating in the commission of a kidnapping and present when the victim was killed. *Chaney*, 730 F.2d at 1350. Thus, *Chaney* stands only for the well accepted proposition that the felony murder statute applies to someone who actively participates in the felony even if he is not the one who actually kills the victim. *Id.* (noting that the "if *he* takes the life" language of the felony murder statute did not excuse a defendant who did not pull the trigger); *see also McDonald v. State*, 674 P.2d 1154, 1155 (Okla. Crim. App. 1984) ("the appellant actively participated in the attempted robbery"); *see also, Banks v. State*, 43 P.3d 390, 397 (Okla. Crim. App. 2002) (defendant was present when victim was kidnapped, raped and murdered); *Spears v. State*, 900 P.2d 431, 439 (Okla. Crim. App. 1995) (defendant participated the murder); *Crawford v. State*, 840 P.2d 627, 631-32 (Okla. Crim. App. 1992) (defendant admitted to kidnapping); *Fowler v. State*, 779 P.2d 580, 585 (Okla. Crim. App. 1989) (physical evidence placed defendant at the scene); *Bell v. State*, 527 P.2d 344, 345-46 (Okla. Crim. App. 1974) (defendant participated in armed break-in). The court in *Chaney* never suggested that the felony murder statute would be expanded to include people not actively participating in the felony.

Neither *Chaney* nor *Lewis* provided a "reasonable warning" that the aider and abettor statute had expanded the scope of the felony murder to include a defendant miles away from the scene of the crime. *Lanier*, 520 US at 269 (prior decisions must give "reasonable warning" that the factual circumstances would be covered by the statute). Moreover, neither the Oklahoma Court of Criminal Appeals, the Western District of Oklahoma, nor the Tenth Circuit have identified a single case where a defendant was convicted of felony murder without being present at, and actively participating in, the underlying felony. Johnson had

absolutely no reason to expect that his conduct was criminal under the felony murder statute.

3. The issue is important. The Oklahoma Court of Criminal Appeals and the Tenth Circuit have attempted to circumvent this Court's rule in *Bouie* by combining two different criminal statutes in a way that does not fit together textually and which was never contemplated by prior precedent. While this issue is of paramount importance to Johnson, who sits incarcerated with no possibility of parole, it is also important to both this Court and future litigants—the Tenth Circuit's decision has chipped away at the breadth of the protection afforded by *Bouie*. The plain language of the felony murder statute requires that a person's conduct occur during the commission of a robbery. Combining it with the aider and abettor statute does not nullify the "in the commission of" requirement. In fact, the Oklahoma Court of Criminal Appeals determined long ago that, even under the aider and abettor statute, a person must be providing some kind of affirmative assent to the felony *while* it is being committed. *See Anderson v. State*, 91 P.2d 794, 797 (Okla. Crim. App. 1939) (providing a loaded pistol prior to the crime did not "aid or abet or assist the [killer] at the time of the actual killing").

B. No Rational Trier of Fact Could have Found that Johnson was Present during the Robbery

On a challenge to the sufficiency of evidence, the question is whether any rational trier of fact "could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The rule gives "full play to the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences." *Id.* Here, the trier of fact never reached whether Johnson was at the bank because the trial court

improperly instructed the jury on felony murder. Thus, there should be none of the natural reluctance to name a jury's finding irrational—the jury that heard the evidence did not make any finding. In fact, the evidence actually indicates that the jury believed Johnson was *not* at the bank at the time of the robbery. C.A. App. X at 3042.

The evidence demonstrating that Johnson was not at the bank is largely undisputed. The Tenth Circuit concedes that the bank was a tiny, prefabricated building and that three competent adults with an unimpeded view saw only one robber, positively identified as Mr. Neill. C.A. App. VI at 1813 and 1818. A full forensic processing has provided ample evidence linking Mr. Neill to the crime scene, but none even suggesting that Johnson was at the bank. C.A. App. VI at 2018-21. In fact, the FBI agents investigating the case concluded that Mr. Neill committed the robbery by himself and Mr. Neill even admitted to committing the crime by himself. C.A. App. X at 3279, 3281-82. Finally, according to the testimony of the State's own witness, it was either nearly impossible or flat out impossible for Johnson to have even been at the bank. *See* pp 24-26, *infra*. In short, the evidence in this case is as close to a scientific certainty as can ever be known in the law: Johnson was not at the bank.

Despite the weight of this evidence, the Tenth Circuit ruled that a theoretical jury could have found that Johnson was at the bank. However, the evidence considered by the Tenth Circuit is incredible on its face and was rejected by the very jury who heard the evidence.

The Tenth Circuit stated that Marilyn Roach, one of the survivors, claims to have heard the voices of two robbers. However, it is undisputed that she only saw one robber and never identified the supposed second voice as belonging to Johnson. Additionally, it is undisputed that

the alleged conversation occurred only after she had been shot twice in the head and lost consciousness. C.A. App. VI at 1833-35; C.A. App. X at 3281-82. Moreover, the two other survivors (who lay next to Ms. Roach and were conscious), stated that there was not a conversation between two robbers. C.A. App. VI at 1809, 1812-13. In fact, they stated that the only conversation that occurred during the entire robbery was between themselves. *Id.* Marilyn Roach even admitted on the stand that the reason she thought it was the voices of two robbers, and not the two other survivors, was because God told her there were two robbers. Even the FBI dismissed her claim as an obvious "hallucination." C.A. App. X at 3281.

Second, the Tenth Circuit relied on the prosecutor's opinion, offered in closing argument, that one person could not have stabbed the three bank workers to death by himself. The prosecutor speculated that one of the bank employees would have tried to run once she saw the others being stabbed unless there was a second person with a gun (and, as a second inference, that the unseen person must have been Johnson). Of course, this kind of inference piled on inference has widely been rejected by the courts. *See State v. Williams*, 630 P.2d 694, 701-02 (Kan. 1981) (rejecting as legally insufficient the prosecutor's supposition that because the decedent's body was found without defensive marks there must have been an accomplice). Moreover, the Tenth Circuit ignored the fact that, following the stabbings, none of the four customers who entered the bank ran when either (i) they saw that three other people had already been brutally killed or (ii) when Mr. Neill methodically walked over to each one and pulled the trigger. It is not reasonable for any trier of fact to convict based on speculation as to what a person might do when faced by a man with a gun in one hand and a knife in the other. *See Brown v. Palmer*, 441 F.3d 347, 352 (6th Cir. 2006)

(granting a writ of habeas where conviction was based only on "reasonable speculation").

Third, a jailhouse "confession" offered by inmate Herman Williams, a convicted perjurer, is equally incredible. Mr. Williams did not dream up the confession until four years after it supposedly took place, when Mr. Williams just happened to be up for parole. In exchange for Mr. Williams' testimony, the prosecutor supported Mr. Williams in his parole hearing and wrote two letters on his behalf to the parole board. C.A. App. VII. at 2143. Moreover, his testimony at trial was objectively false. Mr. Williams' claimed that Johnson, while confessing to planning the robbery in August of 1988, showed him FBI Files. C.A. App. VII at 2152 ;However, Johnson did not obtain any FBI files until he filed his FOIA suit in 1989—a year after the alleged conversation took place. C.A. App. VIII at 2429. No rational jury could have found that guilt established beyond a reasonable doubt based on such self-interested and clearly fabricated testimony.

Finally, the Tenth Circuit disputed Johnson's alibi. This issue is addressed in more detail below. *See* pp 24-26, *infra*. The essential fact is that a State witness, Debbie Ward, testified that Johnson was in her apartment on the day of the robbery talking on her phone until approximately 1 p.m. That left a very short amount of time for him to get to the bank, 16 miles away, by 1:15 p.m. According to the Mrs. Ward's testimony at Mr. Neill's retrial, Johnson left her apartment 12-13 minutes before the robbery. According to her testimony at Johnson's retrial, Johnson had 18 minutes to get to the bank. While it would have been impossible for Johnson to have reached the bank in 12-13 minutes (*see* pp 25-26, *infra*), even assuming a full 18 minutes it is highly unlikely he could have driven the 16 miles in downtown traffic in 18 minutes—it took the State's expert between 19 and 23 minutes just to drive the same route. C.A.

App. VII at 2025. Moreover, Johnson would have actually had much less than 18 minutes to drive the bank. When he left the witness' apartment, he was not walking down to the parking lot, but was walking back to his own apartment. C.A. App. VI at 1917. And, since Debbie Ward testified Johnson was not even wearing shoes while in her apartment, Johnson was not particularly prepared to rob a bank. C.A. App. VI at 1905. After getting ready, he would have had to walk down to the parking lot to his car. However, Mrs. Ward also testified that Johnson's only mode of transportation, a car shared with Mr. Neill, was already gone. C.A. App. VI at 1918. Assuming *arguendo* that the car was there, he would have needed to race the 4 cylinder vehicle to the bank (literally fleeing to the scene of the crime), park it, and go into the bank. And, he would actually have to have been at the bank well before 1:15 since Mr. Neill had greeted the tellers, had his records pulled (which were found laying open on the counter), attempted to cash a forged check, and had the bank call on the check all by 1:15 p.m. Given that an expert testified it took him 17 minutes just to drive the route when driving a 6 cylinder vehicle "flat out" and to the point of recklessness (C.A. App. VIII at 2329-31), no rational jury could have found that Johnson was at the bank even with an 18 minute window.

In contesting the alibi, the Tenth Circuit grossly misconstrues the facts of the case. App., infra 16a-18a. The Tenth Circuit states that Mrs. Ward was not sure whether Mr. Neill had already taken the car before Johnson left her apartment. Mrs. Ward actually testified that "I would have noticed [the car] if it was [still in the parking lot]." C.A. App. VI at 1918. The Tenth Circuit claims that Brent Howard, Mrs. Ward's boyfriend, testified that Johnson left her apartment around 12:50 p.m. Mr. Howard actually testified that he was not sure when Johnson left, and it was just a guess. C.A. App. VI

at 1681 ("[t]o be honest with you, I can't remember"). Moreover, his guess is contradicted by time stamped records showing Johnson was still on the phone until at least 12:54 p.m. C.A. App. VI at 1860. Moreover, Mr. Howard acknowledged he actually left the apartment while Johnson was still on the phone. C.A. App. VI at 1685. The Tenth Circuit also notes that another neighbor, Ms. Pope, knocked on Johnson's door around 2:00 p.m. and 2:30 p.m. and no one answered. Given that Mr. Neill and Johnson were on a plane awaiting takeoff at 2:30 p.m., that testimony is irrelevant. The Tenth Circuit also claims, without any citation, that the State introduced evidence that the route could have been driven in 10-12 minutes. The assertion is false. The State's expert testified only that (i) it took him between 19 and 23 minutes to drive the route and (ii) he might have been able to do it faster than 19 minutes if speeding. C.A. App. VII at 2025. Not only is there no evidence that the route could be drive in 10-12 minutes, it is a mathematic impossibility. C.A. App. VIII at 2271 and 2280. According to the evidence in the record, the fastest anyone could drive the route, parking lot to parking lot, was 17 minutes. Finally, the Tenth Circuit notes that Mr. Neill and Johnson were together in the hours leading up to the robbery. However, it is undisputed that, approximately 15 minutes before the robbery, Johnson was in Ms. Ward's apartment and Mr. Neill was not. Moreover, Mr. Neill and Johnson were not seen together again until they boarded a flight to San Francisco. Johnson's conduct hours before the robbery has no bearing on whether it was possible for him to have traveled the 16 miles to the bank in time to join with Mr. Neill in the robbery by 1:15 p.m.

The application of *Jackson* in this case is straightforward. There is no credible evidence linking Johnson to the bank. Moreover, there is a veritable mountain of

unassailable evidence demonstrating that Johnson could not have been at the bank. Given the evidence in the record, no rational jury could have found beyond a reasonable doubt that Johnson participated in the robbery. The mere speculation and double inference relied on by the state cannot support the verdict. Accordingly, a writ of habeas corpus should be granted. *See Parker v. Renico*, No. 06-2419, 2007 WL 3010436, *7 (6th Cir. Oct. 17, 2007) (granting a writ of habeas where conviction was based only on reasonable speculation).

II. THE TRIAL COURT VIOLATED JOHNSON'S DUE PROCESS AND CONFRONTATION RIGHTS BY LIMITING CROSS EXAMINATION OF AN IMPORTANT GOVERNMENT WITNESS WITHOUT A LEGITIMATE INTEREST.

This Court has long recognized that the Constitution guarantees the right to cross-examine a witness, including the right to test a witness's memory. *See Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (holding that it is a violation of the defendant's due process right to deny an opportunity "to test the witness' recollection" with a prior statement); *see also Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (recognizing a that a court's exclusion of competent evidence impacts the Sixth Amendment right to confrontation). As the Tenth Circuit acknowledged, the constitutionality of the trial court's limitation on cross-examination is directly controlled by *Chambers*, in which this Court noted that "[t]he right to confront and cross-examine witnesses * * * have long been recognized as essential to due process." *Chambers*, 410 U.S. 284. Cross examination can only be limited if there is a legitimate interest, and even then that interest must be carefully examined to ensure the integrity of the fact finding process. *Id.* at 295 (a limitation on cross examination calls into question the "ultimate integrity of

the fact finding process" and requires that the "competing interest be closely examined").

Although the Court has at times explained and limited the scope of *Chambers*, the Court has continued to validate its underlying principle—that an erroneous limitation on cross examination can constitute a due process violation. *See Montana v. Egelhoff*, 518 U.S. 37,52-53 (1996) (while not every defendant's due process rights are violated when evidence favorable to him is excluded, *Chambers* does stand for the proposition that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"). Specifically, the Court has held that *Chambers* still applies where there is "no valid state justification" for the exclusion of exculpatory evidence. *See Crane*, 476 U.S. at 690 ("[i]n the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing"). A restriction on the introduction of evidence violates a defendant's constitutional rights if it is "arbitrary" or "disproportionate." *See United States v. Scheffer*, 523 U.S. 303 (1998); *Green v. Georgia*, 442 U.S. 95, 97 (1979).

If *Chambers* is to continue to have precedential value, it must apply to this case. As detailed below, the facts underlying the instant case and *Chambers* are virtually identical. Moreover, as in *Chambers* and *Crane*, there was "no valid state justification" for the exclusion of evidence. Both the courts below and the respondent have all conceded that the trial court erred in limiting cross examination.

1. Johnson's Alibi. The facts underlying Johnson's alibi and the trial court's error in excluding the evidence are straightforward. It is undisputed that Mr. Neill was

in the bank beginning the robbery by 1:15 p.m.[2] It is also undisputed that Johnson was in Debbie Ward's apartment, 16 miles from the bank, on the phone with the travel agency at 12:54 p.m.[3] Therefore, the only issues to be considered regarding Johnson's alibi are (i) the time he left Mrs. Ward's apartment and (ii) whether that provided sufficient time to travel the 16 miles to the bank in time to arrive by 1:15 p.m.[4]

On the first point, Debbie Ward testified at Mr. Neill's retrial that Johnson did not leave her apartment until 2 to 3 minutes after 1:00 p.m. C.A. App. VI at 1913. That provided Johnson with a window of 12-13 minutes—unless he could travel the 16 miles from Mrs. Ward's apartment to the bank in less than 13 minutes time, he could not have been at the bank to participate in the robbery by 1:15 p.m. However, at Johnson's retrial, Mrs. Ward testified that he left at 1:00 p.m. or slightly before. Her new testimony provided a window of 17-18 minutes to reach the bank. When defense counsel attempted to refresh Debbie Ward's recollection with her prior testimony, the court sustained an objection by the State.

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[2] Time stamped records from the bank confirm that Mr. Neill was already in the bank by 1:15 p.m. C.A. App. VI at 1860.

[3] Time stamped records show that his airline flight was changed at 12:54 p.m. while he was still on the phone with the travel agent. C.A. App. V at 1169-71.

[4] If Johnson did not travel with Mr. Neill to the bank, he was not at the bank at all. There is absolutely no evidence in the record indicating that either Johnson or Mr. Neill had access to any vehicle besides the car purchased by Mr. Neill. Of course, it would be absurd to contemplate that Johnson would have driven a different car to the bank, waiting until the middle of the robbery to show up and participate. However, there is no evidence (or even speculation) suggesting that such an unlikely scenario was even possible. Either Mr. Neill drove Johnson to the bank (and they arrived in time for Mr. Neill to try and cash the forged check by 1:15 p.m.), or Johnson was not at the bank for the robbery.

Id. Thus, the jury only heard Debbie Ward provide the 18 minute window. The difference in her testimony is the difference between it being unlikely and it being impossible that Johnson was at the bank.

Indeed, the evidence in the record establishes conclusively that Johnson could not have reached the bank in 12-13 minutes. The fastest the State's driver could make the run without speeding was almost 19 minutes and it sometimes took as long as 23 minutes. C.A. App. VII at 2025. The fastest time the defense's expert could make the run, in a much faster car, driving "flat out" and speeding to the point of recklessness, was 17 minutes. C.A. App. VIII at 2329-31. In fact, according to a mathematics professor, Johnson would have to have averaged a speed of over 100 miles an hour without braking for stop signs or accelerating afterwards to drive the route in 13 minutes. C.A. App. VIII at 2271 and 2280. In other words, according to Mrs. Ward's original testimony, Johnson could not have arrived at the bank in time to participate in the robbery.

Because it is conceded that the trial court erred in limiting Johnson's right to cross examination, the only question is whether the exclusion of the 13 minute alibi window "substantially influenced" the jury. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *United States v. Valenzuela-Bernal*, 458 U.S. 858 868 (1982) (there is a constitutional violation if the exclusion of the evidence *might* have affected the outcome of the case). If the evidence excluded by the trial court could have created reasonable doubt in the minds of the jurors, habeas relief is warranted. Moreover, because the state court analyzed the error as one of state law, and did not address the constitutional violation, its decision is not entitled to any deference—this court applies the *Brecht* "substantially injured" standard *de novo*. App., *infra*, 155a. Because Johnson's right to cross examination was

limited on the most important witness testifying to the key issue at trial—whether Johnson could have been at the bank—a writ of habeas corpus should be granted.

2. The Tenth Circuit's contrary ruling is incorrect. The Tenth Circuit stated that, under its interpretation of the felony murder statute, it is irrelevant whether Johnson was actually at the bank.

However, under the plain language of the felony murder statute and the relevant case law, Johnson could not be guilty of felony murder unless he was at the bank participating in the robbery. *See* pp 12-17, *supra.* Consequently, a properly instructed jury that heard Mrs. Ward's original testimony could not have convicted Johnson of felony murder. For that reason alone, a writ of habeas corpus should be granted under *Chambers.*

Second, even under the definition of felony murder applied by the trial court and adopted by the Oklahoma Court of Criminal Appeals, Johnson's presence at the bank was still the dominant issue at trial. A jury would naturally have serious doubts about whether a defendant aided and abetted a crime if they knew with certainty that the defendant could not have been directly involved in its commission. Conversely, there is no argument that a defendant did not aid and abet a crime if the defendant was present and participating in the crime itself.

In this case, because of the trial court's ruling, the jury had to still consider the possibility that Johnson was at the bank and helped murder four people. Consequently, the jury had to discount the evidence indicating Johnson was not a knowing participant in the robbery or homicides. The jury should have been entitled to infer that Mr. Neill used Johnson as an unwitting accomplice—Mr. Neill told Johnson that he needed the gun for protection relating to threats about his homosexuality. C.A. App. VIII at 2383. The jury should

have been entitled to credit witness testimony that Mr. Neill hid true purposes from Johnson. C.A. App. VII at 2096. And the jury should have been entitled to credit the testimony of Johnson himself, who has consistently maintained that Mr. Neill told him only that he was going to the bank to try and cash a forged check—a crime that Mr. Neill attempted first, resorting to violence only when the check was denied. Absent the possibility that Johnson was at the bank, the jury was likely to conclude that while Johnson displayed poor judgment and morals, he never consciously joined in a plot to commit a robbery. At the very least, the jury would be left with the far more difficult question of whether helping obtain a gun prior to a robbery is sufficient to demonstrate proof of the intended use and assent to the robbery.

Moreover, if the possibility of Johnson's presence during the robbery was taken off the table, the complexion of the case would have changed. The jury would have viewed the gruesome crime-scene photographs in a different light. Similarly, the coroner's testimony about the sheer number and depth of the stab wounds would have lost much of its sting with regards to Johnson. Those injuries would not have been the result of violence Johnson watched and condoned; they would have occurred outside of his presence and control. Perhaps most importantly, the jury would face none of the natural tendency, in the face of uncertainty, to compromise or split the difference—convicting Johnson of felony murder but declining the death penalty.

Because of the trial court's error, the State was able to keep alive the argument that Johnson helped to murder four people. The trial court denied Johnson his constitutional right to test Debbie Ward's recollection and denied the jury the opportunity to weigh for itself the relevant evidence on the most important issue at trial. Because, under the evidence excluded by the trial

court, a jury would have been substantially more likely to acquit, the trial court's decision affected the outcome and a writ of habeas corpus is warranted. *See Patton v. Mullin*, 425 F.3d 788, 797 (10th Cir. 2005) (the test is whether the excluded evidence "might have affected the trial's outcome").

3. **The issue is important.** While the Court originally limited its decision in *Chambers* to the "facts and circumstances" of the case, the Court has consistently reaffirmed *Chambers*' underlying principles in cases like *Crane* and *Rock v. Arkansas*, 483 U.S. 44 (1987). Even more recently, this court confirmed that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citations omitted). However, even if *Chambers* is limited to the "facts and circumstances" of the case, the facts of the present case are virtually identical to Chambers. If *Chambers* has precedential value, it must apply to Johnson.

In *Chambers*, the defendant was not allowed to "test the witness' recollection, to probe into the details of his alibi, or to 'sift' his conscience so that the jury might judge for itself" whether to believe the adverse witness's testimony. *Chambers*, 410 U.S. 296. Specifically, the defendant wished to examine the witness's recollection regarding a prior confession to the same crime, but was thwarted by an arcane state law. As the Court put it, the evidence the defendant sought to introduce through examination tended to exculpate the defendant and undermine the State's proof. Moreover, the evidence excluded was especially credible because it involved a sworn confession. Because there was no valid basis for

the state law, and because the evidence undermined the state's proof, the exclusion violated the defendant's constitutional rights.

Similarly, Johnson was not allowed to test the witness' recollection or probe the details of his alibi. When Johnson sought to cross examine the state's witness on whether he could have been at the bank and been involved in the robbery, the trial court cut off his inquiry. An essential element of the government's proof for felony murder as set forth in the statute is participation in the commission of a robbery. Yet the exculpatory evidence on that issue was unjustifiably truncated. Moreover, the evidence excluded was especially credible because it was given under oath at trial. Because there was no valid basis for the trial court's decision, and because the excluded evidence exculpated Johnson, the exclusion violated Johnson's constitutional rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 25, 2008

APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed October 26, 2007]

No. 06-6260

ROBERT GRADY JOHNSON,
Petitioner-Appellant,

v.

MIKE MULLIN, Warden,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. No. CIV-04-1602-L)

Michael J. Barta and Benjamin E. Kringer, Baker & Botts L.L.P., Washington, D.C., for Petitioner-Appellant.

Keeley L. Harris, Assistant Attorney General, State of Oklahoma (W. A. Drew Edmondson, Attorney General, with her on the briefs), Oklahoma City, Oklahoma, for Respondent-Appellee.

Before KELLY, BALDOCK, and BRISCOE, *Circuit Judges*.

BRISCOE, *Circuit Judge*.

Petitioner Robert Grady Johnson, an Oklahoma state prisoner convicted of murdering four people

during the course of a bank robbery and sentenced to consecutive terms of life imprisonment without parole, appeals from the district court's denial of his 28 U.S.C. § 2254 petition for federal habeas relief. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

Factual background

On the afternoon of December 14, 1984, a robbery occurred at the First Bank of Chattanooga in Geronimo, Oklahoma. During the course of the robbery, three bank employees were forced into a back room and stabbed to death. Five bank customers, including a married couple and their infant daughter, entered the bank during the robbery and were forced into the same back room. There, they were ordered to lie face down on the floor and all, except for the infant, were shot in the back of the head. One of the customers died from the gunshot wounds.

Three days later, Johnson and Jay Wesley Neill, who shared an apartment in Lawton, Oklahoma, were arrested in a hotel in San Francisco, California, in connection with the bank robbery and murders. At the time of their arrest, Johnson and Neill were found to be in possession of numerous marked bills taken from the bank during the robbery. Law enforcement authorities also discovered that Johnson and Neill had used other marked bills to pay for hotel rooms, limousine rides, and shopping excursions in San Francisco.

Procedural background

Johnson and Neill were charged in the District Court of Comanche County (Oklahoma) with four counts of first degree murder, three counts of shooting with intent to kill, and one count of attempted shooting with intent to kill. The two men were originally tried together and convicted of all the crimes as charged. In accordance with the jury's recommendation, the trial court sentenced both men to death on each of the first degree murder charges, and twenty years' imprisonment on each of the remaining charges. On direct appeal, the OCCA reversed the convictions and sentences and remanded the cases for new trials, concluding that Johnson and Neill were improperly tried together because their defenses were mutually antagonistic, i.e., each defendant asserted the other was solely responsible for commission of the offenses. *Neill v. State*, 827 P.2d 884, 887-88 (Okla. Crim. App. 1992).

Johnson was separately retried in 1993 and convicted of the same eight crimes. He was sentenced to four life sentences without parole on the murder counts, three twenty-year sentences on the shooting with intent to kill counts, and a ten-year sentence on the attempted shooting count, with all sentences to be served consecutively. The trial court entered judgment on July 28, 1993.

Johnson thereafter began what would ultimately prove to be a long and tortuous attempt to obtain a direct appeal of his convictions and sentences. See *Johnson v. Champion*, 288 F.3d 1215, 1218-23, 1230 (10th Cir. 2002) (recounting Johnson's efforts to obtain appellate review of his convictions and

sentences by the OCCA and directing federal district court to grant a writ of habeas corpus ordering Johnson's release unless state authorities afforded him a direct appeal out of time). The OCCA eventually granted Johnson an appeal out of time and, on December 2, 2003, affirmed his convictions and sentences in an unpublished opinion. *Johnson v. State*, No. F-2002-918 (Okla. Crim. App. Dec. 2, 2003) (this opinion will hereinafter be referred to as the "OCCA Op.").

On November 23, 2004, Johnson filed a petition for writ of habeas corpus in federal district court. On March 29, 2006, the magistrate judge assigned to the case issued a lengthy report and recommendation recommending that Johnson's petition be denied. On June 28, 2006, the district court adopted the report and recommendation and denied Johnson's petition. Johnson filed a timely notice of appeal, which the district court construed as an application for certificate of appealability (COA) and denied. On January 18, 2007, this court granted Johnson a certificate of appealability with respect to eight general issues.

II.

Standard of review

Because Johnson filed his federal habeas petition well after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), AEDPA's provisions apply to this appeal. *See McLuckie v. Abbott*, 337 F.3d 1193, 1197 (10th Cir. 2003). "Under AEDPA, the appropriate standard of review depends on whether a claim was decided on the merits in state court." *Id.* "If the claim was not

heard on the merits by the state courts, and the federal district court made its own determination in the first instance, we review the district court's conclusions of law de novo and its findings of fact, if any, for clear error." *Id.* (internal quotations omitted). If, however, the claim was adjudicated on the merits by the state courts, the petitioner will be entitled to federal habeas relief only if he can establish that the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.*, § 2254(d)(2). "When reviewing a state court's application of federal law, we are precluded from issuing the writ simply because we conclude in our independent judgment that the state court applied the law erroneously or incorrectly." *McLuckie*, 337 F.3d at 1197. "Rather, we must be convinced that the application was also objectively unreasonable." *Id.* "This standard does not require our abject deference, . . . but nonetheless prohibits us from substituting our own judgment for that of the state court." *Snow v. Sirmons*, 474 F.3d 693, 696 (10th Cir. 2007) (internal quotation marks omitted).

Propriety of Johnson's murder convictions

In his direct appeal, Johnson asserted a two-fold attack on the propriety of his murder convictions, arguing that he was not present at the scene of the crime and thus could not be convicted as a principal, and that, even if he could be found to have aided and abetted Neill, Oklahoma's "alder and abettor rule c[ould not] be aggregated with the felony-murder rule

to allow a conviction for felony murder when [he] was not present during the commission of the underlying felony." OCCA Op. at 9. The OCCA rejected both of these arguments on the merits. Johnson now renews those arguments in these federal habeas proceedings.

A) Sufficiency of evidence—Johnson's involvement as a principal in the felony murders

Johnson first contends that the OCCA's rejection of his insufficiency of evidence argument was contrary to or an unreasonable application of clearly established federal law. The controlling standard for insufficient evidence claims asserted by state habeas petitioners was established by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). Therein, the Supreme Court noted "that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim." *Id.* at 321. The standard applicable to such a claim, the Court indicated, is as follows:

> [The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." (citation omitted). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the

> prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (citation omitted).

Id. at 318-19.

The OCCA, in affirming Johnson's convictions on direct appeal, did not cite to the Supreme Court's decision in *Jackson*. The OCCA did, however, effectively acknowledge the *Jackson* standard in reviewing Johnson's sufficiency of the evidence challenge, noting that the question at issue was whether, "review[ing] the evidence in the light most favorable to the State, . . . a rational trier of fact could have found [Johnson] guilty of first degree felony murder." OCCA Op. at 3. In resolving that question, the OCCA began, as it indicated it would, by reviewing the evidence presented at trial in the light most favorable to the State:

> The State's evidence showed that in mid-November 1984, co-defendant Neill, with [Johnson] standing next to him, told a friend they were going to rob the Bank because it did not have any security cameras or guards.
>
> Prior to December 1984, [Johnson] told several friends of the severe financial problems he and Neill were experiencing. The week before the crimes, [Johnson] appeared to his neighbors to be nervous and upset. On Sunday December 9, [Johnson] and Neill purchased over $900.00 worth of clothes and jewelry. The next night, [Johnson] and Neill went to dinner at a local restaurant. Neill again mentioned robbing the Bank as a way to solve their financial problems.

On Wednesday, two days before the robbery/homicides were committed, Neill visited a local pawnshop and inquired about the purchase of a gun. He indicated to the clerk that he needed the gun for protection as he had received threatening phone calls. Different types of guns were described to him and he was told that he must have a gun permit from the police department in order to purchase a gun. However, at nineteen years old, Neill was too young to apply for the permit.

The next morning, Neill talked with a travel agent at the Lawton Municipal Airport. He originally wanted a flight to Nassau leaving after 6:00 p.m. Friday, December 14th. When told there was not a flight available, he requested one to San Francisco leaving after 5:00 p.m. that Friday. Neill also inquired into hotel accommodations, specifically executive suites and limousine services. When asked for payment, Neill said he would pay cash on Friday.

That same morning, the twenty-one year old [Johnson] applied for a gun permit at the Lawton Police Department. He volunteered that he lived alone and needed the gun for protection. He was told he would have to wait twenty-four hours before he could pick up the permit.

At approximately 1:15 p.m. that afternoon, [Johnson] and Neill walked into the Bank. They stayed only a few minutes, talking only with each other and looking around the Bank. Approximately 45 minutes later, [Johnson] and Neill purchased two hunting knives at a local discount store. They initially looked at purchasing a gun, but when informed the guns in that

store were not real, they both looked at the selection of knives. After discussion among themselves, they selected two knives, each with a six-inch blade. Neill wrote a check for the knives from the checking account he shared with [Johnson]. Both Neill and [Johnson] provided identification for the check.

On the day of the robbery/homicides, Friday, December 14, 1984, at approximately 10:00 a.m., [Johnson] and Neill returned to the pawnshop and asked for a revolver seen on a previous visit. Neill asked what type of ammunition was needed for the gun, and [Johnson] asked where they could purchase that type of ammunition. Both men were shown how to load and fire the gun, and both men held the gun. They told the clerk they were to get the gun permit by 2:30 p.m. that afternoon and would be back then to purchase the gun.

At approximately 11:30 a.m., December 14, [Johnson] returned to the police department and picked up the gun permit. At approximately 12:25 p.m., both men returned to the pawnshop to purchase the gun. They hurriedly filled out the appropriate forms. Instead of listing his apartment as his address, [Johnson] wrote down a false post office box number. [Johnson] started to write the check to pay for the gun, but Neill insisted on filling out the check. The gun was handed to [Johnson] and he and Neill left the store.

[Johnson] and Neill then went to a local discount store to purchase ammunition. While Neill was asking about ammunition, [Johnson] went to find masking tape to purchase. Once

again, Neill was too young to purchase the ammunition, so he waited for [Johnson]'s return. Within 30 minutes of purchasing the ammunition and leaving the store, [Johnson] and Neill returned to the store to exchange the shells. The gun they had purchased had been mistakenly marked as a .38 caliber when it was actually a .32 caliber. So, the .38 caliber shells purchased had to be exchanged for .32 caliber shells.

At approximately 12:45 p.m., [Johnson] went to a neighbor's apartment to use the telephone. He rescheduled the travel plans for an earlier flight, leaving at approximately 2:30 p.m. that afternoon.

Shortly after 1:00 p.m., [Johnson] and Neill entered the Bank. Bank employees Kay Bruno, Jerry Bowles and Joyce Mullenix were herded to a back room, forced to lie face down on the floor and stabbed to death. At the front of the Bank, Bellen Robles had entered in order to deposit a check. Finding the teller windows empty, she looked down the hallway to the back room. There she saw the back of a man as he bent over something. She went outside to tell her waiting husband, R[uben], that she thought the Bank was being robbed. He doubted this, and went inside the Bank with his wife and their fourteen (14) month old daughter. Entering the Bank just behind them was local farmer, Ralph Zeller. Barely inside the front door, they were greeted with a gun pointed at them and told to go to the back room if they wanted to live. Once in the back room they were directed to lie down on the floor.

The Robles and Mr. Zell[er] were left in the back room while Neill went up to the front of the Bank to sack up the money. While he was doing so, another customer, Marilyn Roach, entered the Bank. Neill pointed the gun at her and forced her to the back room. She was barely able to lie down inside the small, now crowded room. Moments later the gunshots rang out. Ms. Roach was shot twice in the head[, as was Mr. Zeller, who died from his injuries]. Bellen and Ruben Robles were each shot once in the head. Turning his head to keep the blood out of his eyes, Ruben Robles saw the gun pointed at his baby daughter and heard it click. But no shots were fired; the gun was empty.

One of the first people in the bank after the robbery/homicides was Calvin Bowles. As Bowles checked the status of the bodies lying on the floor, R[uben] Robles rose up and said they had been shot in the head. His wife, Bellen, then rose up and said to her husband, "I told you they were robbing the bank." Paul Franklin, who was also one of the first people on the scene after the shootings, testified to helping emergency medical personnel carry out Marilyn Roach. Mr. Franklin testified Ms. Roach asked, "Are they gone?"

Marilyn Roach later told investigators that after the shooting stopped, she heard two distinct voices in the bank. One voice, which sounded, "upset" said, "I told you not to shoot anybody." The other voice, which sounded "casual," responded, "well, they moved."

At approximately 2:00 p.m. that day, Dara Pope arrived at her apartment across the hall from the apartment shared by [Johnson] and

> Neill. She knocked on [Johnson]'s door but no one responded.
>
> [Johnson] and Neill arrived at the Lawton Airport at approximately 2:30 p.m. They paid one thousand two hundred dollars ($1,200.00) in cash for their tickets and boarded the plane; carrying only a tote bag. After arriving in San Francisco, [Johnson] and Neill embarked on a spending spree, traveling by limousine to various clubs and stores. They were arrested in their San Francisco hotel, Monday, December 17, 1984.
>
> That same day, [Johnson] was interviewed by Federal Bureau of Investigation (FBI) Agent Dave Knowlton. In response to the agent's questions, [Johnson] said Neill had told him on December 13 of his plan to rob the Bank, and that Neill asked [Johnson]'s help in obtaining a gun. [Johnson] said he did help Neill acquire the gun and that after the robbery, he threw the gun in a pond. [Johnson] also told Agent Knowlton that Neill had a hunting knife with him when he left the apartment to go to the Bank.
>
> Sometime after December 14, 1984, the apartment shared by [Johnson] and Neill was cleaned by the apartment complex's maintenance man. The scabbards belonging to the knives [Johnson] and Neill had purchased were found hidden behind sheetrock up close to the ceiling in the hall closet where the furnace was located.

Id. at 3-8. The OCCA then concluded that "[t]his evidence showed [Johnson] fully participated in the planning and execution of the robbery/homicides." *Id.* at 8. "Although," the OCCA noted, "[Johnson] was not identified by any witnesses as being inside the Bank

with Neill, his conduct leading up to the robbery/homicides, and his conduct after the crimes, creates a reasonable inference that his was the other voice heard by Marilyn Roach inside the bank." *Id.* at 8-9. Thus, the OCCA concluded, the "evidence [wa]s sufficient to find [Johnson] guilty as a principal to felony-murder." *Id.* at Johnson contends the OCCA's conclusion represents an unreasonable application of the *Jackson* standard because, in his view, no rational jury could have found that he was present at the bank and actively participating in the robbery. In support of this general contention, Johnson offers four specific arguments:

> 1) "[t]hree competent adults with a full view of the bank all saw only one robber, positively identified as [co-defendant] Jay Wesley Neill," Aplt. Supp. Br. at 19;
>
> 2) "[d]espite a full forensic processing, no physical evidence even suggests that Mr. Johnson was at the crime scene," *id.*;
>
> 3) "the alibi evidence, even [viewed] in the light most favorable to the State, left no time for Mr. Johnson to have been at the bank, unless he had access to a car that was already gone and traveled 16 miles in, at most, 17 minutes," *id.*; and
>
> 4) "[e]ven the FBI agents investigating the case concluded that Mr. Neill committed the robbery by himself," *id.* at 19-20.

Johnson's first two arguments are historically accurate. None of the three surviving victims of the bank robbery (Bellen Robles, Ruben Robles, and Marilyn Roach) visually observed a second robber.

Further, no physical evidence, such as fingerprints, hair samples, or clothing fibers, found at the crime scene positively implicated Johnson as having been present during the robbery. That, however, is not the end of the story. Marilyn Roach, one of the surviving victims, clearly and unequivocally testified that, after she and three other bank customers (the Robles and Ralph Zeller) were shot, she heard a voice say, "I thought I told you not to shoot anybody," and a second, distinct voice respond, "[Wien they moved." App. at 1834; *id.* at 1843 ("The tone and the voices were different."). Consistent with having heard two voices, Roach asked at the time of her rescue from the bank, "[A]re *they* gone?" *Id.* at 1835 (emphasis added). In addition to Roach's testimony, the evidence strongly suggests, as the State argued during the first stage proceedings, that the murders of the three bank employees could not have been committed in the manner that they were unless both Neill and Johnson were present at the bank. Immediately following the crime, the three bank employees (Kay Bruno, Joyce Mullenix, and Jerri Bowles) were found dead in a back room, laying on their stomachs, touching or nearly touching each other. *Id.* at 1791. Richard Boatsman, the medical examiner for Comanche County, Oklahoma, who performed the autopsies on the three bank employees, testified that each victim suffered multiple stab wounds (Bruno suffered thirty-four stab wounds, Mullenix suffered twenty-seven stab wounds, and Bowles suffered fourteen stab wounds), including large, gaping, "back and forth sawing type of incisional wound[s]" to their necks, *id.* at 2214, each of which would have taken considerable work and effort, *id.* at 2203. Despite the quantity and severity of these wounds, Boatsman

found no defensive wounds on any of the three victims, except for perhaps one defensive wound on the finger of Ms. Bowles. As the prosecutor emphasized during first-stage closing arguments, it is unlikely that one perpetrator could have physically controlled all three women in a manner that would have allowed him to carry out the relatively lengthy attacks without any of the women attempting to fight back or flee. *Id.* at 2954 ("Can you alone keep those people there long enough for you to kill them with the knife? You cannot do it. They're not gonna hold still while you're knifing them. Somebody's gonna get up and run. Somebody's gonna fight you."). In other words, as the prosecutor argued, the more likely scenario is that both Neill and Johnson were present at the scene, and one of them performed the actual killings while the other controlled the victims by use of a gun or otherwise. *Id.* at 2955 ("I'll tell you why nobody fought. While they was being stabbed someone else had a gun to their head. What's your choices? Either fight this knife or be shot."). Finally, the State presented evidence of a jailhouse confession that Johnson made while confined in the Comanche County Jail in August 1988. According to witness Herman Williams, Johnson told Williams that he (Johnson) and Neill "planned it [the bank robbery] together and that they planned it in a way in which there would be no survivors." *Id.* at 2134. Williams further testified that Johnson told him "that the situation inside the bank got so gross until he [Johnson] had to leave" the bank and go sit in their automobile that was parked near the bank. *Id.* In light of all this evidence, we conclude that a jury could reasonably have found that Johnson was present at the bank during the robbery and murders.

Turning to Johnson's third argument, he suggests that his "alibi evidence" would have prevented a jury from reasonably finding that he was present at the bank during the robbery and murders. The "alibi evidence" that Johnson refers to is primarily his own testimony that on the day of the robbery and murders, he remained at his own apartment while Neill, allegedly unbeknownst to Johnson, carried out the crimes. In particular, Johnson testified that he visited a neighbor's (Debbie Ward's) apartment to use her telephone shortly before 1:00 p.m. that day, did not leave Ward's apartment until 2 or 3 minutes after 1:00 p.m., and did not see Neill until shortly before 2 p.m. when he (Neill) returned to the apartment. In an attempt to bolster his testimony, Johnson elicited testimony from Debbie Ward that when she left her apartment that day to return to work, she did not observe Neill's car (the only vehicle owned by Neill and Johnson) in the apartment complex parking lot. Johnson also presented evidence suggesting that it would have taken a person, at an absolute minimum, more than seventeen minutes to drive from his apartment complex to the bank. In light of this evidence, Johnson asserted, it would have been impossible for him to have been at the bank at the time the crimes were committed.

What Johnson fails to note, however, is that his "alibi evidence" was far from uncontroverted. To begin with, the evidence overwhelmingly established that Johnson and Neill were together in the hours prior to the robbery, first picking up a gun permit from the Lawton Police Department (which Johnson had applied for the day before), then visiting a pawn shop at approximately 12:20 p.m. to purchase a

handgun, and finally making back-to-back visits to a local department store to purchase ammunition for the handgun (during their first visit to the store, Neill and Johnson purchased the wrong ammunition and thus had to return shortly thereafter to exchange it). Testimony from Johnson's neighbor, Debbie Ward, suggests that Johnson and Neill returned to their apartment following their purchase of the gun and ammunition (presumably, the jury could reasonably infer, to prepare themselves for the robbery and finalize preparations for their post-robbery trip). Specifically, Ward testified that she came home for lunch on the day of the robbery, and that at approximately 12:45 p.m., Johnson came to her door and asked to use her telephone. According to Ward, she overheard Johnson on the telephone saying he needed to change his flight schedule. Ward further testified that Johnson completed his telephone call and the two left her apartment shortly before 1 p.m., she to return to work and Johnson presumably to return to his own apartment. Although Ward testified under cross-examination by defense counsel that she did not observe Neill's car in the apartment parking lot when she left that afternoon, she acknowledged on redirect that during the preliminary hearing in 1985, she testified that she "did not particularly notice" if Neill's car was there or not. *Id.* at 1921. Brent Howard, Ward's boyfriend at the time of the crime, testified that he was also at Ward's apartment during the noon hour on the day of the robbery. Similar to Ward, Howard testified that Johnson came to Ward's apartment and proceeded to make a telephone call in which he asked to move his reservations up to as close to 2:30 p.m. as he could get them. Howard also testified that he and

Ward left her apartment at approximately 12:50 p.m., and that he proceeded to drive her back to work for a 1:00 p.m. appointment. In addition to the testimony of Ward and Howard, the State presented evidence indicating that it took approximately twenty minutes to drive at the established speed limits from Johnson's apartment complex to the bank, but that it was possible, if exceeding the speed limits, to complete the trip in as little as ten to twelve minutes. The State also presented evidence indicating that a telephone call occurred between Kay Bruno, the branch manager, and the Glendale Savings & Loan Association in Tampa, Florida, and that the call ended at approximately 1:16 p.m. on the day of the robbery. Finally, the State presented evidence that Dara Pope, who shared an apartment with Debbie Ward, knocked on the door of Johnson's apartment at 2 p.m., and again at 2:30 p.m., and that on neither occasion did anyone answer. Considering all of this evidence together, we conclude a rational jury could reasonably have found that, notwithstanding Johnson's "alibi evidence," it was not only possible for him to have been at the Bank at the time of the robbery and murders, but that he was present and actively participating. More specifically, the jury could reasonably have found that Johnson left Ward's apartment shortly before 1 p.m., and that he and Neill proceeded soon thereafter to the Bank, arriving at some point between approximately 1:10 and 1:15 p.m.

In his final argument in support of his insufficiency claim, Johnson asserts that "[e]ven the FBI agents investigating the case concluded that Mr. Neill committed the robbery by himself." Aplt. Supp. Br. at 19-20. Presumably, Johnson is referring to two

reports from Federal Bureau of Investigation agent Granville Long, one dated April 15, 1985, and the other one undated. App. at 3279-81. In the April 15th report, Long gives a narrative of the offense, stating, in pertinent part: "At approximately 1:15 p.m. on Friday, December 14, 1984, an individual, subsequently identified as JAY WESLEY NEILL, entered the FIRST BANK OF CHATTANOOGA, Geronimo Branch, Geronimo, Oklahoma, *apparently alone,* to commit a robbery." *Id.* at 3279 (emphasis added). In the undated report, Long states that, "[o]n the basis of [his] investigation," "it seems apparent . . . that JAY WESLEY NEILL entered the bank and perpetrated the murders and robbery by himself although he was assisted in the planning, preparation, and purchase of the instruments utilized in the crime by JOHNSON." *Id.* at 3281.

The problem for Johnson is three-fold. First, there is no indication in the record on appeal that these reports were admitted into evidence at trial. Second, even assuming they were admitted, they amount to nothing more than one person's opinion as to the probable chain of events. Lastly, at the time Long prepared these two reports, he did not have access to all of the evidence that was ultimately presented by the State at trial (for example, Long clearly would not have had access to the testimony of Herman Williams, who described the jailhouse confession of Johnson in August 1988). Thus, the conclusions tentatively reached by Long in his two reports do nothing to undercut the conclusion, outlined above, that the evidence presented by the State was sufficient for a rational jury to reasonably find that

Johnson was present at the Bank during, and actively participating in, the robbery and murders.

In summary, we conclude that the OCCA reasonably applied the *Jackson* standard in rejecting Johnson's argument that the evidence presented at trial was insufficient to allow the jury to find him guilty as a principal in the felony murders. Thus, Johnson is not entitled to federal habeas relief on this claim.

B) OCCA's application of felony murder doctrine

In affirming Johnson's murder convictions on direct appeal, the OCCA also concluded that, "[a]ssuming arguendo, the evidence showed [Johnson] was not in the Bank with Neill at the time of the robbery/homicides, evidence of [his] participation in the planning and his active involvement in the steps necessary to ensure completion of the plan [wa]s sufficient to find him guilty as a principal to felony-murder." OCCA Op. at 12. In particular, the OCCA noted that it "ha[d] specifically applied the aider and abettor rule to felony-murder cases," *id.* at 10, and that doing so "[wa]s consistent with the [Oklahoma] Legislature's definition of felony-murder" because it "'[wa]s a reflection of the policy that one who, by his willful criminal conduct, sets in motion a chain of events so perilous to the sanctity of human life that death results therefrom must bear the ultimate responsibility for his actions.'" *Id.* at 11 (quoting *Hatch v. State*, 662 P.2d 1377, 1384 (Okla. Crim. App. 1983)). In turn, the OCCA noted that Johnson's "participation in acquiring the gun permit and the weapons, 'casing' the Bank the day before the crimes, rescheduling travel arrangements to leave town

immediately after the crimes, and taking the stolen money to and spending it in San Francisco [wa]s clear evidence that [Johnson] aided and abetted Neill in the commission of the robbery/homicides . . . ." *Id.* at 13. Because, the OCCA concluded, "[Johnson] and Neill together created a situation inherently dangerous to human life," Johnson "[could not] disclaim responsibility for his acts," and was thus liable "as a principal for felony-murder." *Id.*

In these federal habeas proceedings, Johnson attempts to challenge the OCCA's conclusion that, even assuming he only aided and abetted Neill, he was still subject to conviction for felony-murder. Johnson offers six arguments in support of this challenge. First, he contends that "the jury expressly rejected the theory that [he] aided [and] abetted the murders."[1] Aplt. Supp. Br. at 23. Second, he argues that Oklahoma's "aider/abettor statute cannot be aggregated with [Oklahoma's] felony murder statute to broaden the scope of the felony murder statute." *Id.* Third, he argues that "the Oklahoma legislature itself recognized that the felony murder statute was not broadened by the aiders/abettors statute." *Id.* at 24. Fourth, he contends that "the aider/abettor statute only means that a defendant who aids and abets in a crime is guilty as a principal of that crime, not of felony murder." *Id.* at 25. Fifth, he argues that "even if the aider and abettor statute could be

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[1] It is unclear what Johnson is basing this assertion on. Nothing in the record on appeal indicates that the jury found that he did not aid and abet Neill. Moreover, a review of the trial transcript indicates that the State's evidence overwhelmingly established that he actively participated in the planning and execution of the robbery, regardless of whether or not he was actually present at the bank at the time of the robbery.

combined with the felony murder statute, a person is not guilty as an aider and abettor simply because they helped someone acquire a gun before a robbery." *Id.* at 25-26. Sixth, and finally, he argues that "the OCCA's decision to retroactively define the scope of the felony murder statute implicates not only state-law questions, but also violates [his due process] rights under the constitution." *Id.* at 27.

The problem with Johnson's first five arguments is that they all focus exclusively on the proper interpretation of Oklahoma state law. As the Supreme Court emphasized in *Estelle v. McGuire*, 502 U.S. 62 (1991), "it is not the province of a federal habeas court to reexamine state court determinations on state-law questions." *Id.* at 67-68. Rather, the Court stated, "[i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Id.* at 68.

Thus, that leaves only Johnson's sixth and final argument, i.e., that the OCCA's application of both the aider and abettor and the felony-murder doctrines to his case violated his federal due process rights. The initial problem with this argument is that there is no indication in the record on appeal that Johnson ever presented this argument to the OCCA.[2] As a result, it appears the claim is unexhausted and, ultimately, procedurally barred, since it is too late for Johnson to file an application for state post-conviction relief raising the claim. *See Anderson v. Sirmons*, 476 F.3d 1131, 1139 n.7 (10th Cir. 2007)

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[2] Johnson's appendix does not include the direct appeal briefs he filed with the OCCA.

("Anticipatory procedural bar occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it.") (internal quotation marks omitted).

Even assuming, for purposes of argument, that Johnson properly exhausted his due process claim, we conclude there is no merit to it. Although Johnson argues that the OCCA's decision in his case represents "the first time in Oklahoma history" that the OCCA held "that a defendant can be convicted of felony murder without proof that he was actively engaged in the commission of the underlying felony," Aplt. Supp. Br. at 27, he is mistaken. As the OCCA noted in affirming Johnson's murder convictions on direct appeal, it previously applied the aider and abettor rule in the felony-murder context in the case of *Lewis v. State*, 451 P.2d 399 (Okla. Crim. App. 1967). In *Lewis*, the defendant and two co-defendants planned the robbery of a gas station, but in carrying out that plan the defendant merely drove "the get-away car and did not enter the premises nor participate in the assault made upon [the gas station operator] who was robbed, shot and beaten by" the two co-defendants. *Id.* at 400. The defendant was convicted of murder and sentenced to death. In disposing of the defendant's direct appeal, the OCCA concluded "that the evidence amply support[ed] the defendant's conviction for the crime of Murder as a principal under the felony murder rule . . . ."[3] *Id.*

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[3] Apparently, the victim in *Lewis*, after being robbed, shot and beaten, was forced into the get-away car, where he was shot several additional times, and then his body was disposed of. *Tilford v. State*, 437 P.2d 261, 264 (Okla. Crim. App. 1968) (affirming conviction of Lewis's co-

Thus, the *Lewis* case clearly placed Johnson on notice that he could be held liable as a principal for felony-murder, even if he "merely" aided and abetted Neill in the commission of the bank robbery.

Even ignoring the *Lewis* decision, we note, as the State has pointed out in response to Johnson's habeas petition and appeal, that in 1984 this court, in the context of a federal habeas proceeding initiated by an Oklahoma state prisoner, held that a first degree murder conviction under Oklahoma law could be upheld by application of "the aider and abettor statute, together with the Oklahoma felony murder statute . . . ." *Chaney v. Brown*, 730 F.2d 1334, 1350 (10th Cir. 1984). In reaching this holding, this court effectively rejected the construction of Oklahoma's then-existing felony-murder statute that is now urged by Johnson in these proceedings.

Finally, it is important to emphasize that Johnson's attack on the OCCA's dual application of the aider and abettor and felony-murder rules hinges, in substantial part, on his assertion that all he did in assisting Neill was to "acquire [the] gun before [the] robbery." Aplt. Supp. Br. at 26. A review of the state trial transcript, however, overwhelmingly establishes that Johnson played a far greater role in the planning and execution of the robbery. Even assuming, for purposes of argument, that Johnson was not present at the bank during the actual robbery, it is

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defendant). Although it could be argued that these facts distinguish *Lewis* from the instant case (i.e., that the defendant in *Lewis* actively participated in the get-away and thus was present when the additional shots were fired at the victim), the important point is that the felony-murder charge arose out of the commission of the robbery, and not out of any potential kidnapping or other charge.

clear that he helped Neill purchase the gun and knives used during the crime, helped Neill "scout" out the bank on the day prior to the robbery, actively participated in making and executing the getaway plans, and assisted Neill in spending the robbery proceeds.

In sum, we conclude that Johnson is not entitled to federal habeas relief arising out of the OCCA's dual application of the aider and abettor and felony-murder rules under Oklahoma state law.

Denial of right to fair trial

Johnson contends that the separate and cumulative effect of trial court errors and prosecutorial misconduct deprived him of a fair trial and due process of law. As discussed below, however, there is no merit to any of the individual claims asserted by Johnson. Moreover, we note that there is no indication in the record on appeal that Johnson asserted any type of cumulative error argument on direct appeal, and thus his current references to the "cumulative effect" of the trial court errors and prosecutorial misconduct are unexhausted and, in turn, subject to anticipatory procedural bar.

A) Trial court's instructions - felony murder

Johnson first contends the trial court gave incomplete and misleading instructions on the crime of felony murder. More specifically, Johnson contends the jury in his case "should have been instructed that [he] could not be convicted of felony murder if [they] found . . . that he was not present and participating in the Geronimo Bank robbery." Aplt. Supp. Br. at 30.

Johnson raised this claim in his direct appeal, and the OCCA rejected it, stating as follows:

> In his second assignment of error, [Johnson] contends the trial court erred in failing to instruct the jury that in order to find him guilty of first degree felony-murder, the jury must initially find he was present when the deaths occurred.
>
> The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court. (citation omitted). Absent an abuse of that discretion, this Court will not interfere with the trial court's judgment if the instructions as a whole, accurately state the applicable law. (citation omitted).
>
> As discussed above, this Court has upheld convictions for felony-murder where the defendant was not present at the time of death. (citations omitted). Therefore, [Johnson]'s requested instruction was properly refused by the trial court as it was not an accurate statement of the law.
>
> A review of the instructions given to the jury in the present case shows a proper and accurate statement of the law. The jury was instructed on the elements of felony-murder and the elements of the underlying offense of robbery with a dangerous weapon. (citation omitted). The jury was also instructed that the State must prove each element of the charged offense beyond a reasonable doubt. (citations omitted). The instructions in this case clearly stated that in order for [Johnson] to be found guilty of first degree

> felony-murder, the State must prove beyond a reasonable doubt that [Johnson]'s conduct caused the death of the persons killed. These instructions adequately set forth the applicable law. Finding no error, this assignment of error is denied.

OCCA Op. at 14-15.

For the reasons noted above, we conclude that the OCCA's resolution of this issue was neither contrary to, nor an unreasonable application of, clearly established federal law.

B) Trial court's ruling regarding cross-examination of Debbie Ward

Johnson contends the trial court violated his right to a fair trial when it refused to allow defense counsel to refresh prosecution witness Debbie Ward's recollection with her prior sworn testimony from the trial of co-defendant Neill. Johnson first raised this issue on direct appeal. The OCCA rejected it on the merits:

> In his fifth assignment of error, [Johnson] contends the trial court erred in denying defense counsel the opportunity to refresh Debbie Ward's recollection of her testimony given in Neill's re-trial. The record shows that during cross-examination, the following occurred:
>
> Q. (defense counsel) Ms. Ward, you've testified in this case in the past, have you not?
> A. Yes.
> Q. Do you recall that you testified in the retrial of Jay Wesley Neill?
> A. Yes.
> * * *

Q. And do you recall that Mr. Schulte asked you this referring to the afternoon of Friday, December 14, 1984. "What time did you leave to go back to work, as best you can recall?" Do you recall that he asked you that?
A. Yes.
Q. Do you recall that you responded I probably left the apartment about two or three minutes after 1:00 o'clock. Do you recall that you said that?
A. No, I don't recall saying that.
Q. You don't recall that you said that?
A. No, I don't.
Q. Okay. Would it refresh your recollection if I showed you the transcript?
A. Sure.
Q. Okay.

Mr. Barta (defense counsel): Your Honor, may I approach?

Mr. Schulte (prosecutor): Your Honor, it's improper. He just quoted from the transcript and she said she didn't recall.

The Court: Sustained.

(Tr. Vol. V., pgs. 1434-35).

Pursuant to 12 O.S. 1981, § 2613(B), defense counsel should have been permitted to refresh the witnesses' [sic] recollection with the transcript of her previous testimony. In *Rogers v. State*, 721 P.2d 805, 808 (Okl.Cr.1986) this Court stated:

> Title 12 0.S. 1981, § 2613(B) clearly governs this issue: Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless

> the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate them thereon.
>
> This rule requires counsel, normally the cross-examiner, to first ask the witness about the prior inconsistency, and then given [sic] the witness the opportunity to deny, affirm, or explain the earlier statement. Also imposed upon counsel is the duty of identifying the subject matter of the statement, the time and place of its utterance, and the person to whom it was made.

721 P.2d at 807-808. See also *Neal v. State*, 837 P.2d 919, 921 (Okl.Cr.1992).

Here, Ms. Ward did not recall her previous testimony and responded that her recollection would be refreshed if she could see the transcript of her testimony. While the record is not clear, it appears defense counsel had a copy of the transcript in his possession and was prepared to show it to the witness.

> [Johnson] asserts this error warrants reversing his conviction as the time he left Ms. Ward's apartment "was a key fact in establishing that he could not have been at the bank at the time Jay Neill committed the crimes." A good deal of [Johnson]'s defense at trial was spent trying to show that he could not have physically traveled the distance between his apartment and the Bank within the estimated time frame of the robbery/homicides. However, on appeal, we have found [Johnson] can legally be held criminally liable for the robbery/homicides even if he had

> not been in the Bank at the actual time of the robbery/homicides. Therefore, [Johnson] has failed to show any prejudice as a result of the trial court's ruling. (citation omitted). Accordingly, the error was harmless and this assignment of error is denied.

OCCA Op. at 19-21.

The question we now face is whether the OCCA's resolution of Johnson's claim was contrary to, or an unreasonable application of, clearly established federal law. The "clearly established federal law" applicable to this claim is the Supreme Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973). Therein, the Court held that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Id.* at 294. More specifically, the Court held an accused has, at a minimum, "a right to examine the witnesses against him" and "to offer testimony" in his defense. *Id.* "In order to establish a violation of his due process right to present evidence, a defendant must show that the evidence excluded by the trial court's ruling might have affected the trial's outcome; in other words, he must show that the evidence, if admitted, would have created reasonable doubt that did not exist without the evidence." *Patton v. Mullin*, 425 F.3d 788, 797 (10th Cir. 2005) (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 868 (1982)).

We are not persuaded that the OCCA's decision was contrary to, or an unreasonable application of, these principles. As the OCCA explained, the evidence presented by the State at trial overwhelmingly

established that Johnson aided and abetted Neill in carrying out the robbery and homicides. Thus, regardless of whether or not Johnson was present at the Bank during the robbery, he was, as already discussed, responsible for the robbery and homicides under a combination of Oklahoma's aiding and abetting statute and its felony murder statute. In other words, because of the application of these two rules, it is beyond dispute that, had the trial court allowed defense counsel to refresh Debra Ward's testimony, it would not have altered the outcome of trial.

Even reviewing the issue de novo and ignoring application of the aiding and abetting statute, we conclude the trial court's error did not affect the outcome of the trial. As noted, Debra Ward's boyfriend, Brent Howard, testified as part of the State's case-in-chief that he and Ward left her apartment at approximately 12:50 p.m. on the day of the robbery (or at least sometime before 1 p.m.), and that he drove Ward back to her place of business for a 1:00 p.m. appointment. In light of Howard's testimony, the jury could reasonably have found that Johnson likewise left Ward's apartment at approximately 12:50, and that he and Neill then proceeded soon thereafter to drive to the Bank. In other words, even if defense counsel had been allowed to refresh Ward's testimony, the jury could still reasonably have concluded that Howard's time estimate was more accurate than Ward's (or that the actual time was somewhere between the two estimates), that Ward and Johnson actually left Ward's apartment before 1:00 p.m. that day, and that Johnson in turn was able to drive to the

Bank with Neill and participate in the commission of the robbery and murders.

C) Admission into evidence of second bloody knife

Johnson contends the trial court violated his right to a fair trial by admitting into evidence what he refers to as the "second bloody knife," i.e., a knife that was recovered from the floor of the bank following the crime and that was determined to have the blood of a victim on the handle but not the blade. Johnson contends, as he did at trial, that the "second bloody knife" was used by the medical examiner during the autopsy of one of the victims and thus was contaminated with that victim's blood. Johnson raised this issue on direct appeal, and it was rejected on the merits by the OCCA:

> [Johnson] argues in his twelfth assignment of error that the introduction of a second, bloody knife denied him a fair trial, as the State did not establish a sufficient chain of custody.
>
> "The purpose of the chain of custody rule is to guard against substitution of or tampering with the evidence between the time it is found and the time it is analyzed." (citation omitted). While it is the State's responsibility to show the evidence offered is in substantially the same condition at the time of offering as when the crime was committed, it is not necessary that all possibility of alteration be negated. (citation omitted). If there is only speculation that tampering or alteration occurred, it is proper to admit evidence and let what doubt there may be go to its weight rather than render the evidence completely inadmissible. (citation omitted).

Arnold Bentz [an OSBI chemist] testified he found a knife at the scene of the murders that had some blood on the handle but none on its blade. Bentz stated he placed the knife in a sealed envelope and initialed the envelope. The sealed envelope was taken to the Lawton regional laboratory and later transferred to the FBI in Washington D.C., for testing. On cross-examination, defense counsel tried to establish that before the envelope was transferred to the FBI it had been unsealed. Bentz testified that the envelope was sealed when it was sent to the FBI and he had no knowledge of what happened to it after its transfer.

Agent William Eubanks, FBI, testified he received a package containing a knife, which was identified as having been found at the Bank. Agent Eubanks said he tested the knife for the presence of human blood. Eubanks had no other recollection concerning the container the knife[] arrived in.

When the prosecutor attempted to admit the knife, marked as State's Exhibit 12, into evidence, the defense objected. The prosecutor admitted he had been "lax" on the chain of custody, but he understood there was an agreement that the chain of custody of the physical evidence would not be an issue. The prosecutor admitted the original containers holding the evidence ha[d] been discarded long ago, but he had presented testimony from the FBI agents, which handled the evidence, and which he believed sufficiently established the trial [sic] the evidence followed.

In a bench conference, defense counsel argued that the evidence would show that before the envelope containing the knife was sent to the FBI, the envelope was unsealed, the knife taken out and used at the autopsy of Kay Bruno where it was inserted into one of her wounds. Defense counsel argued that evidence raised serious questions as to the integrity of the testing of the knife and any blood on the knife was relevant on the issue of whether the knife was actually used in the murders or simply fell out of a pocket. The trial court overruled the defense objections and admitted into evidence State's Exhibit 12.

Subsequently, OSBI Agent Richard Goss testified he and Bentz were present at the autopsies. Agent Goss testified the Medical Examiner, Dr. Boat[s]man, had a question about the knife that was found at the scene. Goss said Bentz retrieved the knife he had collected from the Bank, removed it from its envelope, and held it up. Goss said Dr. Boat[s]man, who was standing across the room, looked at the knife and Bentz placed the knife back in its envelope and removed it from the room. Goss said neither he nor Dr. Boat[s]man handled the knife, that only Bentz handled it.

Dr. Boat[s]man acknowledged he had testified a number of times in this case. The prosecutor went over a transcript where there was some indication that a knife or something similar to a knife had been inserted into a wound during an autopsy. Dr. Boat[s]man said he recalled the passage but said the prosecutor's description was not an accurate interpretation. Dr. Boat[s]man

testified it was a metal probe that had been inserted into the wounds. He said that was standard procedure in an autopsy and was used to determine the direction and depth of the wound. Dr. Boat[s]man said that never in his long career, having done approximately 100 autopsies, had he ever inserted a knife into a victim.

On cross-examination, defense counsel reviewed with Dr. Boat[s]man his previous testimony where he indicated a knife had been placed into a wound. Dr. Boat[s]man admitted his response had been poorly worded and it did sound as if a knife had been inserted. He explained that it had not been a knife but a metal probe that had been used during the autopsy.

Here, the State's evidence showed the knife was substantially in the same condition at the time of offering as when it was found in the Bank. At best, the record offers only speculation that the knife might have been tampered with prior to its examination by the FBI. Therefore, the trial court properly admitted the evidence with any doubts going to the weight to be given the evidence by the jury. Accordingly, this assignment of error is denied.

OCCA Op. at 33-36.

In determining whether the OCCA's resolution of this issue was contrary to, or an unreasonable application of, clearly established federal law, the threshold determination that must be made is identifying what, if any, "clearly established federal

law" applies to the issue. In his opening appellate brief, Johnson cites to only one Supreme Court decision, *Miller v. Pate*, 386 U.S. 1 (1967). Aplt. Supp. Br. at 39. *Miller*, however, held only "that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."[4] Because there is simply no indication in the record on appeal that the prosecution in Johnson's case knowingly used false evidence (let alone that there was any false evidence at all), *Miller* is inapplicable. That, in turn, leaves, at most, only the general due process right to a fair trial that has been identified by the Supreme Court in other contexts. *E.g. Medina v. California*, 505 U.S. 437, 449 (1992) (referring to due process right to a fair trial in the context of a defendant's competency to stand trial); *but see Anderson v. Mullin*, 327 F.3d 1148, 1153 (10th Cir. 2003) (noting that "our inquiry is tightly constrained by the AEDPA's requirement that there be clearly established federal law on point").

After reviewing the record on appeal, we conclude that the OCCA's decision was neither contrary to, nor an unreasonable application of, the general due process right to a fair trial. Dr. Boatsman, the medical examiner who performed the autopsies on all four victims, testified on direct examination by the prosecution that he recalled testifying several times previously in Johnson's case and acknowledged that his prior testimony on one of those occasions "could be interpreted" as indicating that he put a knife in a

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[4] In *Miller*, the state prosecutor deliberately misrepresented at trial that a pair of men's undershorts were stained with blood from the victim of a brutal sex attack, when in fact the undershorts were stained with paint. 386 U.S. at 6-7.

wound of one of the victims. App. at 2228. However, Dr. Boatsman characterized his prior testimony as "poorly worded," *id.* at 2229, and testified that he had not, in fact, inserted a knife in a victim's wound. *Id.* at 2228. Dr. Boatsman explained that, in accordance with "standard procedure," he had inserted "a metal probe," i.e., "a glorified piece of stiff wire that has no cutting surfaces," in order "to determine [the] direction and depth of wounds . . . ." *Id.* at 2229. Further, Dr. Boatsman unequivocally denied ever inserting a knife in a victim's wound during any autopsy performed in his career. *Id.* On cross-examination, Dr. Boatsman reiterated that it was "standard procedure in investigating gunshot wounds or knife wounds to probe them with something," but he denied using a knife to do so, and instead again testified that he had in fact utilized a stiff wire "probe." *Id.* at 2233. In light of Dr. Boatsman's unequivocal testimony, it was entirely reasonable for the OCCA to have concluded that the trial court's admission of the second knife did not violate Johnson's due process right to a fair trial.

D) Admission of statements made by Johnson to Paul Dunn

Johnson contends the trial court violated his right to a fair trial by admitting into evidence statements that he made in various post-arrest letters to an individual named Paul Dunn. According to Johnson, these statements "were inflammatory, prejudicial, and not even arguably probative of any legitimate issue in the case." App. Supp. Br. at 41. Johnson

raised this issue on direct appeal. The OCCA rejected the issue on the merits:

> [Johnson] argues in his ninth assignment of error that he was denied a fair trial by the admission of his statements in letters to Paul Dunn. Mr. Dunn had contacted [Johnson] in prison and told him he wanted to write a book about [Johnson] and Neill's story. [Johnson] now complains the prosecutor repeatedly questioned him regarding his statements to Dunn in which [Johnson] indicated he thought he could make money by turning the story of the Geronimo Bank robbery into a book or movie. [Johnson] also complains the prosecutor improperly questioned him concerning statements he made insulting Oklahomans, statements made wherein he used profanity and statements regarding his sexual orientation. [Johnson] asserts the prosecutor's questioning had no bearing on his guilt or innocence and was completely irrelevant and inflammatory so that any possible probative value was outweighed by unfair prejudice.
>
> [Johnson]'s defense was that he did not participate in the robbery/homicides and was unaware of Neill's plans to rob the Bank. [Johnson] also testified that he had a "horrible" childhood, that he was abused by his stepfather, and that he watched his stepfather abuse his mother, which resulted in his passive nature.
>
> To rebut that defense, the prosecutor introduced statements [Johnson] had made in his letters to Mr. Dunn. In these letters, [Johnson] attempted to elicit money for his accounting of

the robbery/homicides. [Johnson] said in part, "I know I have a good story and I know it will make a great book/movie. I'm just waiting for a reasonable financial opportunity. I feel it's only fair. I'm eager and ready." Defense counsel's objections on the grounds of relevance were overruled. [Johnson] admitted to signing a contract with Dunn with any money he would receive going to his mother.

[Johnson] also admitted to writing to Mr. Dunn that he enjoyed growing up, and loved school. No objection was raised by defense counsel. [Johnson] wrote in another letter of his experiences with school counselors in regards to people calling him names, but never in regards to problems with his stepfather. In one letter, [Johnson] even stated, "I would complain to the counselors just to make them aware how immature these dumb Oklahoma hicks were." Again, the prosecutor's inquiry was not met with an objection.

While certain of the above prosecutorial inquiries [Johnson] now challenges were met with timely objections at trial, others were not. Reviewing the challenged comments for reversible error, plain or timely preserved, we find the comments did not deny [Johnson] a fair trial. As a general rule, any matter is a proper subject of cross-examination which is responsive to testimony given on direct examination or which is material or relevant thereto and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness. (citation omitted). It has long been a rule of the Court that

> when a defendant opens up a field of inquiry on direct examination, he may not complain of subsequent cross-examination. (citation omitted). The extent of cross-examination rests in the discretion of the trial court and reversal is only warranted where there is an abuse of discretion resulting in prejudice to the defendant. (citation omitted).
>
> The prosecutor's inquiry into [Johnson]'s letters to Paul Dunn was not beyond the scope of direct examination in this case. While the letters themselves were not raised on direct examination, their content directly rebutted [Johnson]'s claims of innocence and ignorance. The letters also rebutted his pleas for sympathy based upon an unfortunate childhood. Accordingly, we find the trial court did not abuse its discretion in allowing the inquiries into [Johnson]'s letters to Paul Dunn. This assignment of error is denied.

OCCA Op. at 28-30.

The OCCA's resolution of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. As with his previous claim of error concerning the admission of the second knife, Johnson has failed to identify a Supreme Court case precisely on point.[5] Thus, the "clearly estab-

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[5] The only Supreme Court case cited by Johnson in support of this claim, *Old Chief v. United States*, 519 U.S. 172 (1997), is inapposite. *Old Chief*, which involved a federal prosecution, discussed only the admission of evidence under the Federal Rules of Evidence, and did not make any pronouncements regarding the interplay of the admission of evidence and the due process right to a fair trial.

lished federal law" applicable to this claim is, at best, simply the general due process right to a fair trial. In turn, a review of the trial transcript substantiates, as indicated by the OCCA, that Johnson testified in his own defense that he (a) suffered a "horrible" childhood, App. at 2357, in large part due to verbal and physical abuse from his stepfather, (b) suffered similar abuse at the hands of Neill, (c) was in fact scared of Neill, particularly after the robbery and murders, (d) was completely ignorant, and thus innocent, of the planning and commission of the robbery and murders, and (e) that numerous prosecution witnesses who testified contrary to him had lied. In light of Johnson's testimony, we agree with the OCCA that the contents of Johnson's letters to Dunn were relevant for purposes of rebutting Johnson's testimony and challenging his credibility in general.[6] Accordingly, the OCCA's decision affirming the trial court's admission of this evidence was neither contrary to, nor an unreasonable application of, the general due process right to a fair trial that has been identified by the Supreme Court.

E) Prosecutor's comments regarding Johnson's sexual orientation

Johnson complains that the prosecutor made repeated, gratuitous, and prejudicial comments regard-

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[6] Under cross-examination by the prosecutor regarding his letters to Dunn, Johnson acknowledged (a) telling Dunn that he knew he "ha[d] a good story" that would "make a great book/movie," App. at 2441, (b) entering into a contract with Dunn, *id.* at 2443, (c) trying to frighten Dunn via letter, *id.* at 2453-54, and (d) telling Dunn that he "enjoyed growing up," *id.* at 2454.

ing Johnson's sexual orientation. In particular, Johnson complains that the prosecutor:

> indicated in his first-stage opening statement that Johnson accompanied Neill to a "gay area" of San Francisco;
>
> asked a witness about Johnson and Neill visiting "gay bars" in San Francisco; and
>
> asked Johnson, during cross-examination, if he knew that the hotel he originally booked in San Francisco was a "noted gay hotel."

Johnson also complains that the prosecutor at times questioned witnesses about Johnson's sexual orientation. According to Johnson, the prosecutor's references "preyed on the public's fear, distrust, and dislike of an especially disfavored group" in order "[t]o obtain a conviction . . . ." Aplt. Supp. Br. at 44.

Johnson first raised this issue on direct appeal. The OCCA rejected it on the merits:

> In his seventh assignment of error, [Johnson] complains he was denied a fair trial by the prosecutor's comments on his sexual orientation. * * *
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> * * *
>
> [Johnson] asserts he was improperly questioned by the prosecutor on cross-examination concerning his relationship with Neill. The record shows the prosecutor was well within the scope of cross-examination as [Johnson] specifically testified to his relationship with Neill. [Johnson] admitted that he was in a homosexual relationship with Neill. [Johnson] portrayed Neill as the dominant member of the relationship

and himself as the passive member. [Johnson]'s defense to his participation in any aspect of the crimes was that he was under Neill's domination and acted as he did because of his relationship with Neill. This Court has repeatedly held that prosecutorial remarks are not grounds for reversal where they are invited, provoked or occasioned by defense counsel (citations omitted). Here, the prosecutor's comments were invited by [Johnson]'s direct examination.

[Johnson] further argues the prosecutor repeatedly made comments regarding his homosexual activities that had nothing to do with his relationship with Neill, and were clearly irrelevant and prejudicial. Specifically, he refers to comments and questioning by the prosecutor that while in San Francisco, [Johnson] visited "gay areas" and "gay bars" and that he and Neill stayed in a "gay hotel."

Certain information concerning [Johnson]'s activities in San Francisco were relevant in showing [Johnson]'s conduct leading up to his arrest and apprehension. (citation omitted). To use [Johnson]'s description, any "gratuitous" comments, or comments which improperly emphasized [Johnson]'s homosexuality is not cause for reversal. Allegations of prosecutorial misconduct should not cause a reversal of judgment or modification of sentence unless their cumulative effect is such as to deprive the defendant of a fair trial and fair sentencing proceeding. (citation omitted). In considering whether the prosecutor's comments rendered the trial fundamentally unfair, we review the comments in context, con-

> sidering the evidence and whether the remarks can be said to have influenced the verdict against [Johnson]. (citation omitted). Here, we are not persuaded that any improper remarks seriously affected the fairness of the trial. Although [Johnson] disputed much of the State's evidence, the evidence of guilt was substantial. Considering also the jury instructions given in this case, we find the prosecutor's comments did not improperly influence the jury's consideration of the evidence. (footnote omitted). Accordingly, [Johnson] was not denied a fair trial by the prosecutor's comments on his sexual orientation.

OCCA Op. at 24-26.

The controlling standard for this claim, under the AEDPA standard of review, was set forth by the Supreme Court in *Darden v. Wainwright*, 477 U.S. 168 (1986). "The relevant question," the Supreme Court held in Darden, "is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

After examining the entire trial transcript, we conclude that the OCCA's decision was neither contrary to, nor an unreasonable application of, *Darden*. To begin with, it is important to note that the defense made no attempt to hide, and indeed expressly acknowledged the homosexual relationship between Johnson and Neill. For example, during the first-stage opening arguments, defense counsel stated:

> The evidence will show that at that time Jay Wesley Neill and Robby Johnson were involved

> in an intimate relationship. They lived together. They were homosexuals. Whatever your feelings are about that, ladies and gentlemen, and I know a lot of us have a hard time understanding it, but that's what the evidence in this case will show and you have promised not to judge my client for his relationship with Jay Neill but only for the crimes with which he has been charged.

App. at 1499. Consistent with this opening statement, Johnson testified in his own defense that he had been a "practicing homosexual" all of his life, *id.* at 2352, that his life essentially "centered around" his sexual orientation, *id.*, and that he met Neill at "a gay bar . . . in Lawton." *Id.* at 2358. Moreover, it is clear from the record that Johnson attempted to bolster his "complete innocence" defense by eliciting evidence regarding his own passive and effeminate characteristics, as well as evidence that he was allegedly dominated, and at times abused, by Neill. For example, during the cross-examination of Rhonda Neff, a woman who lived with Johnson and Neill during the fall of 1984, defense counsel was able to elicit testimony that Johnson was very passive and friendly, and that Neill dominated and was verbally abusive towards Johnson. Likewise, Johnson himself testified that he was abused by his stepfather because he was a "sissy," *id.* at 2353, that Neill was the dominant person in their relationship, *id.* at 2366, and that he was in fact frightened by Neill when Neill returned from the bank following the crime. *Id.* at 2404. Finally, in the first-stage closing arguments, defense counsel again acknowledged Johnson's "homosexual lifestyle with Jay Neill," *id.* at 2879, and argued that Johnson was a "passive, shy

effeminate person who was not capable of going in the Geronimo Bank and engaging in the carvings . . ." *Id.* at 2926. In light of these defense tactics, we agree with the OCCA that the prosecutor's relatively limited references to Johnson's homosexuality in no way rendered Johnson's trial unfair or a violation of due process.

F) Prosecutor's introduction of testimony from Herman Williams

Johnson contends that the prosecutor violated his due process right to a fair trial by introducing the testimony of Herman Williams, who, as previously noted, testified that, while both he and Johnson were confined in the Comanche County Jail in August 1988, Johnson admitted to him that he was present at the Bank during the robbery and murders. Johnson characterizes Williams as a "serial perjurer who was looking to curry favor with anyone who would support his attempts to obtain parole . . . ." Aplt. Supp. Br. at 49-50. Johnson further argues that "Williams' testimony was incredible on its face." *Id.* at 50. In sum, Johnson argues that the prosecutor knowingly introduced false evidence.

Johnson asserted this same claim on direct appeal. The OCCA rejected it on the merits:

> In his thirteenth assignment of error, [Johnson] asserts he was denied a fair trial by the prosecution's knowing use of false evidence in the form of testimony by jailhouse snitch Herman Williams. [Johnson] relies on *Omalza v. State,* 911 P.2d 286, 307 (Okl.Cr.1995) to argue the knowing use of false or misleading evidence important to the prosecution's case in chief violates

the Due Process Clause of the Fourteenth Amendment. In *Omalza* we stated, "[t]o prove the claim on appeal the appellant bears the burden to establish (1) certain testimony was misleading, (2) the prosecution knowingly used the testimony and (3) the testimony was material to guilt or innocence. *Id.*

In response to a defense objection concerning William's [sic] testimony, an in-camera hearing was held to determine the admissibility of the testimony. In that hearing it was established that Williams was then incarcerated at Joseph Harp Correctional Center and had been so for approximately the past five years. Williams said he was serving a life sentence for possession of cocaine with intent to distribute. He admitted to pleading guilty to "three assaults and battery with a dangerous weapon" for which he received three ten year sentences to run concurrently with his life sentence. He also admitted to having been convicted of and serving time for intimidation of a State's witness, "subordination" of perjury, and conspiracy to commit perjury. Williams testified that [Johnson] approached him while in jail and told him he was involved in the Geronimo Bank robbery and murders.

Williams also testified that [Johnson]'s trial was the second time he had provided information to law enforcement since he had received his life sentence, and that previously he had provided information on several occasions in drug cases. Williams said he was aware the District Attorney had made a request on his behalf to the Pardon and Parole Board for leniency. He said he did not

> expect to receive any further requests for leniency from the State and was testifying because of a religious experience he had experienced since being incarcerated. Williams admitted he had waited four years before he told the authorities about his conversation with [Johnson].
>
> At the conclusion of his examination of Williams, defense counsel renewed his objection to the testimony. After hearing argument from both sides, the trial court ruled the testimony admissible and its weight and credibility for the jury's determination.
>
> [Johnson] has failed to show the State knowingly used false testimony. Merely because Williams' testimony was contradicted by [Johnson]'s testimony does not make it false. Further, if anything had been left out during the State's direct examination about Williams' criminal history or his decision to tell law enforcement about [Johnson]'s statements, it was certainly brought out by the defense on cross-examination. Cross- examination was very thorough and Williams' criminal history and reason for testifying was fully presented to the jury. Further, Williams' credibility to a certain extent was impeached on cross-examination. Having reviewed the record, we find [Johnson] has failed to demonstrate the State knowingly used false evidence. This assignment of error is denied.

OCCA Op. at 37-38.

The question we must decide is whether the OCCA's resolution of this issue was contrary to, or an

unreasonable application of, clearly established federal law. In *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court reversed a conviction obtained through the use of false evidence that was known to be false by representatives of the State. "Since *Napue*," the Supreme Court "has adhered to the principle that a conviction obtained by the knowing use of false evidence is fundamentally unfair." *Evans v. Virginia*, 471 U.S. 1025, 1027-28 (1985).

After reviewing the record on appeal in this case, we conclude that the OCCA's decision was neither contrary to, nor an unreasonable application of, *Napue*, and its progeny. Importantly, nothing in the record substantiates Johnson's assertion that Williams' testimony was false, let alone that the prosecution knew the testimony was false. Although Williams' credibility was certainly in question, given his past convictions and his admitted interest in obtaining parole, his testimony was not, as asserted by Johnson, "incredible on its face." To the contrary, Williams' testimony was entirely plausible. Moreover, as pointed out by the OCCA, the record establishes that Williams was subjected to strenuous cross-examination by defense counsel, and the issue of Williams' credibility was ultimately, and properly, left for the jury to determine.

G) Prosecutor's introduction of "mathematically impossible" time trials

Johnson contends that the prosecutor also knowingly introduced false testimony in the form of what Johnson refers to as "mathematically impossible time trials supposedly conducted by the FBI." Aplt. Supp. Br. at 51. In support of his contention, Johnson

argues that FBI "Agent [Leroy] Foreman's testimony that he drove the route [from Johnson's apartment to the Bank], without speeding, in 18 minutes and 52 seconds is wrong as a matter of mathematic certainty," and "[t]he State was well aware of this." *Id.* Further, Johnson argues the defense provided the prosecution with an expert report prior to trial that indicated, "given the distances involved and the speed limits, an individual could not complete the route in the time claimed by the FBI without speeding," yet "[t]he State has not and cannot point to any errors in the [defense] expert's analysis." *Id.*

The threshold question we must address is what standard of review to apply to this issue. According to the parties, the issue was raised by Johnson in his direct appeal brief (although, as noted by respondent, the magistrate judge in this case concluded it "was presented as what appears to [have] be[en] an afterthought").[7] Notably, however, there is no mention of the issue in the OCCA's opinion disposing of Johnson's direct appeal. Thus, the issue could be considered (a) unexhausted (as the district court in this case did) and procedurally barred, (b) having been implicitly rejected on the merits by the OCCA and thus subject to the normal AEDPA standards of review, or (c) having been overlooked by the OCCA and thus subject to de novo review by this court. *See Young v. Sirmons*, 486 F.3d 655, 663 (10th Cir. 2007) ("If the state court did not decide a claim on the merits, and it is not otherwise procedurally barred, we review the district court's legal conclusions de

[7] We again note that Johnson's direct appeal brief is not included in the appendix he filed with this court.

novo"). Out of an abundance of caution, we will treat the issue as having been overlooked by the OCCA and review the issue de novo.

Foreman, an FBI agent, was involved in the investigation of the robbery and murders. As part of his investigation, he performed what the prosecution referred to "as time trials from the Tanglewood Apartments [where Johnson and Neill lived] to the Geronimo Bank." App. at 2025. More specifically, Foreman drove "several times" back and forth between the two locations. *Id.* According to Foreman, when he "deliberately went . . . the speed limit and obeyed all the traffic signs," "the fastest time" he was able to drive it was "eighteen minutes, fifty-two seconds, and the slowest time was about twenty-three minutes." *Id.* Foreman also testified that he could have driven the route faster had he not observed all traffic laws. *Id.* at 2026. On cross-examination, defense counsel questioned Foreman about the precise route he drove between the two locations, and Foreman reaffirmed the time results he had obtained.

Upon completion of the State's case-in-chief, Johnson presented several witnesses in his own defense, including Brad Davis, an assistant professor of mathematics at a local university. Davis opined, based solely on mathematics, that the fastest a person could drive between the two locations while observing all traffic laws would be eighteen minutes and fifty-nine seconds. Although it is not clear from the record on appeal, the defense apparently provided the prosecution, prior to trial, with a report prepared by Davis outlining his conclusions.

Apparently, Johnson would have us characterize Foreman's testimony as false simply because it contradicted, ever so slightly, the conclusions reached by Davis. Johnson would also, apparently, have us find that the prosecution knew that Foreman's testimony was false simply because, after having received Davis's report, it proceeded to introduce Foreman's testimony during its case-in-chief. Johnson is clearly mistaken in both regards. The fact that Foreman was able to drive the route in a slightly faster time than estimated by Davis could be attributed to (a) Foreman failing to completely observe all traffic laws, (b) Davis having miscalculated the possible driving times, or (c) a combination of the two. Importantly, none of these possible circumstances necessarily render Foreman's testimony false. Nor could a court reasonably find, based on these circumstances, that the prosecution acted wrongly in proceeding to present Foreman's testimony at trial. Thus, there is clearly no merit to Johnson's assertions that his due process right to a fair trial was violated by the admission of Foreman's testimony.

H) Prosecutor's introduction of testimony from Marilyn Roach

Johnson contends the prosecutor knowingly introduced a third piece of allegedly false evidence, i.e., the testimony of surviving victim Marilyn Roach that she heard the voices of two robbers. Johnson claims Roach's testimony in this regard was "clearly false" because "Roach admit[ted] that the alleged conversation between the two robbers took place after she had been shot twice in the head and lost consciousness." Aplt. Supp. Br. at 53. Johnson further notes

that the two other surviving victims, Bellen and Ruben Robles, "were lying right beside Ms. Roach," but "did not lose consciousness" and later "told the FBI that they did not hear the conversation Roach claims to have heard, and that the only conversation in the bank at that time was a conversation between the two of them." *Id.* Thus, Johnson argues, "[t]he only reasonable inference is the conclusion reached by the FBI: The voices Ms. Roach believed she heard were in fact the voices of the other survivors." *Id.* In turn, Johnson argues that "[t]he prosecutor knew that Ms. Roach's testimony was not true" because the chief FBI investigator concluded at one point in a report that Roach's testimony was the product of a hallucination. *Id.*

Johnson asserted a similar claim on direct appeal. The OCCA rejected the claim on the merits:

> [Johnson] next argues he was denied a fair trial by the admission of Marilyn Roach's testimony. Ms. Roach was the only victim to testify she heard two different voices in the Bank at the time of the robbery. [Johnson] asserts her testimony was not trustworthy as it was based in part on her belief that God spoke to her and referred to the perpetrator of the crime in the plural form. Further, he contends the testimony is not trustworthy because Ms. Roach admitted she heard the conversation between the two robbers after she had been shot twice in the head and had lost consciousness. Citing to an FBI report included in the original record, but not introduced at trial, the FBI agent in charge of the investigation into the robbery/murders concluded Ms. Roach had been "hallucinating"

when she thought she heard the conversation between two people in the bank. [Johnson] argues that under these circumstances, the trial court should not have allowed Ms. Roach to testify about her "hallucinations" which lacked even the most basic indicia of reliability.

[Johnson] fails to cite any legal authority to support his allegations. Absent plain error we will not address assertions unsupported by legal authority. (citation omitted).

Every person is competent to be a witness except as otherwise provided in the Oklahoma Evidence Code. (citation omitted). A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. (citation omitted). Evidence to prove personal knowledge may consist of the witness's own testimony. (citation omitted).

Marilyn Roach testified to matters of which she had personal knowledge. The weight and credibility of her testimony was exclusively for the jury's determination. (citation omitted). As we stated in *Martinez v. State,* 984 P.2d 813, 824 (Okl.Cr.1999), *cert. denied,* 529 U.S. 1102, 120 S.Ct. 1840, 146 L.Ed.2d 782 (2000):

> Determining the weight and credibility of witness testimony, therefore, has long been held to be the "part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men." *Scheffer,* 523 U.S. at —, 118

S.Ct. at 1266, quoting *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88, 11 S.Ct. 720, 724-25, 35 L.Ed. 371 (1891).

Accordingly, we find no plain error in the trial court's admission of Marilyn Roach's testimony. This assignment of error is denied.

OCCA Op. at 39-40.

The OCCA's analysis, though lacking any citations to Supreme Court precedent, is neither contrary to, nor an unreasonable application of, *Napue* and its progeny. On direct examination, Roach described entering the bank, encountering a robber (whose facial features she could not remember), and being forced at gun-point to walk to the back room of the bank. Roach in turn testified that, while laying face-down on the floor of the back room, she was shot twice in the back of the head and may have lost consciousness. After the shooting stopped, Roach testified, she heard someone say, in an "upset" manner, "I thought I told you not to shoot anybody," and a second, distinct voice answer, "Well they moved." App. at 1834. On cross-examination by Johnson's counsel, Roach stated that "[t]he tone and the voices [she heard] were different." *Id.* at 1843. Roach further testified that, due to the brain damage she suffered initially following the gun shot wound and her recovery therefrom, she was able to remember the events more clearly at the time of trial than immediately following the crime. *Id.* at 1844-45. On redirect, Roach testified that every time she has been interviewed or questioned about the crime, she has provided the same information regarding the voices she heard. *Id.* at 1848. Roach's credibility was

bolstered by the testimony of prosecution witness Charles Ingalls, an Oklahoma City-based neurosurgeon who treated Roach in the emergency room following the shooting. Ingalls testified that there was no damage to Roach's left ear or to any portion of her brain that would have affected the hearing in her left ear. *Id.* at 2244. Ingalls further testified that there was nothing in his examination of Roach that indicated she could not have heard or recalled voices in the bank following the shooting. *Id.* at 2245.

To be sure, Roach's credibility was subject to reasonable challenge. As noted, the voices she testified hearing occurred after she was shot twice in the back of the head and possibly lost consciousness. Further, neither of the other two surviving witnesses (i.e., the Robles) heard any other voices, and in fact the Robles testified that they briefly conversed with each other following the shooting. Finally, as noted by Johnson, FBI agent Granville Long, the chief investigator on the case, prepared a report at some point (the precise date of the report is unclear from the record, and the report was not presented at trial) opining:

> It is believed highly probable that ROACH was hallucinating somewhat after her injury and that certain things she recalled as being said were, in fact, said in general but they are variations of things she overheard the ROBLES' [sic] saying to each other as they lay on the floor feigning death mixed in with statements made by witnesses who were arriving on the scene very shortly after the departure of the robber. The basic point to be observed is that ROACH, while having almost total view of the bank, saw only one individual in the bank. Also, all of the information which she

> provided which would indicate that two persons were in the bank is contradictory to that previously provided by the ROBLES' [sic] whose other information, for the most, has been corroborated.

Id. at 3281. Nevertheless, we agree with the OCCA that this evidence did not necessarily render Roach's testimony false, and that the question of Roach's credibility was ultimately for the jury to decide.[8]

I) Prosecutor's second-stage arguments

In his final issue on appeal, Johnson contends that the prosecutor violated his due process right to a fair sentencing proceeding when, during second-stage closing arguments, he stated:

> Any time you have a death, four deaths, four additional people shot, of this magnitude, and the individuals for what reason so that [they] can take the money, hit the gay bars, party and do cocaine and go on a shopping spree in San Francisco. * * * And I pray that you're strong enough—there is only one verdict—to get up, go in that deliberation room, render your decision, make it unanimous. Those of you that are strong on this jury work on the weak. * * * [Defense] [c]ounsel wants one of you that is not strong enough to assess the death penalty and if he is able to get that then he saves this man's life. * * * I pray you, I beseech you stay strong. * * * Make sure you check the aggravating circum-

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[8] For essentially the same reasons, we conclude that Johnson has failed to establish any knowing misconduct on the part of the prosecution in presenting Roach's testimony.

> stances that apply, hold your head up high, you follow the law. You were committed to your oath.

App. at 3263-64 (emphasis added as suggested in Johnson's opening appellate brief). "Taken together," Johnson asserts, these statements by the prosecutor "add up to an argument that was intentionally designed to prey upon the passions and prejudices of the jury to obtain a sentence on improper grounds." Aplt. Supp. Br. at 58. In other words, Johnson asserts, the prosecutor's "closing was profoundly unfair and corrupted the sentence." *Id.*

Johnson challenged some, but not all, of these prosecutorial arguments on direct appeal to the OCCA. The OCCA rejected the arguments actually raised by Johnson:

> In his seventeenth and final assignment of error, [Johnson] asserts he was denied a fair sentencing proceeding by comments of the prosecutor during second stage closing argument. [Johnson] argues the prosecutor's repeated admonitions for the jurors to be strong and do their duty influenced their decision and resulted in a harsher sentence than he might have otherwise received.
>
> Initially, [Johnson] directs us to the following comment:
>
> > Bring your common sense to this case. Any time you have a death, four deaths, four additional people shot, of this magnitude, and the individuals for what reason so that [they] can take the money, hit the gay bars, party and do cocaine and go on a shopping spree in San Francisco . . . I pray that you're strong

> enough—there is only one verdict—to get up, go in that deliberation room, render your decision, make it unanimous. Those of you that are strong on this jury work on the weak.

(Tr. Vol. IX, pg. 2777).

Defense counsel objected only to the reference to the weak, and not any other part of the comment reprinted above. (Tr. Vol. IX, pg. 2778). Accordingly, [Johnson]'s complaints on appeal concerning 'yet another gratuitous reference to [his] homosexuality' have been waived for all but plain error. (citation omitted). A prosecutor has the right to discuss evidence during the second stage in arguing for an appropriate punishment. (citation omitted). The comment in the present case was based on the evidence. Therefore, we find no plain error.

Further, it is not error for the prosecutor to focus on the jury's duty to serve and render a verdict based upon the evidence or acknowledge to the jury the difficulty of their task and ask them seriously to consider the punishment options available. (citation omitted). The comments here are not equivalent to those in other cases that we have held to be improper and prejudicial as playing on societal alarm or as inflaming the passions or prejudices of the jury. (citation omitted). The comments focused on the duty of the jurors to serve and render a verdict based upon the evidence.

[Johnson] next argues the prosecutor improperly asked the jury to have sympathy for the victims and not to show any mercy or pity for the

> defendant. The citation to the record for this comment shows defense counsel's objection was to a part of the argument, which referred to what had been done by "jurors before you." No objection was made to the comments now challenged on appeal. Therefore, we review those comments only for plain error.
>
> It is improper for the prosecution to ask jurors to have sympathy for victims. (citation omitted). However, the prosecution, as well as the defense, has the right to discuss fully from their standpoint the evidence, and the inferences and deductions arising therefrom. (citation omitted). The prosecutor's reference to the "horrible, horrible death" that four people in this case experienced was based on the evidence and not merely an appeal for sympathy.
>
> Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such [as] to deprive the defendant of a fair trial. (citation omitted). Because we do not find that any comments deprived [Johnson] of a fair sentencing proceeding, this assignment of error is denied.

OCCA Op. at 47-49.

The "clearly established Federal law" applicable under AEDPA to this claim is the Supreme Court's decision in *Darden v. Wainwright*, 477 U.S. 168 (1986). In *Darden*, a state habeas petitioner sentenced to death argued that the prosecutors in his case made improper remarks during second-stage closing arguments that deprived him of his right to a fair trial. The Supreme Court held that "[t]he

relevant question" in addressing such claims "is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 181 (quoting *Donnelly*, 416 U.S. at 643). Notably, the Supreme Court emphasized that "it is not enough," to establish a due process violation, "that the prosecutors' remarks were undesirable or even universally condemned." 477 U.S. at 181 (internal quotation remarks omitted). Similarly, this court, in applying the *Darden* standard, has held that "not every improper or unfair remark made by a prosecutor will amount to a federal constitutional deprivation." *Tillman v. Cook*, 215 F.3d 1116, 1129 (10th Cir. 2000).

After reviewing the record, we readily conclude that the OCCA's resolution of this claim was neither contrary to, nor an unreasonable application of, the standard outlined in *Darden*. To begin with, the prosecutor's reference to the post-crime behavior of Johnson and Neill (i.e., visiting gay bars, etc.), was nothing more than a comment on the evidence properly admitted at trial (and it is not entirely clear from the record that this precise claim was ever presented to the OCCA on direct appeal). Although the remaining statements made by the prosecutor, essentially asking the jury to remain "strong," were perhaps improper, they were not sufficiently egregious to render the second-stage proceedings unfair. In this regard, it is important to note that the trial court instructed the jury that it was their responsibility to render a verdict based on the evidence, App. at 3286, and that "[n]o statement or argument of the attorneys [wa]s evidence." *Id.* at 3287; *see Darden*, 477 U.S. at 182 (noting, in concluding that

prosecutors' improper comments did not result in a denial of due process, that "[t]he trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence."). Moreover, a review of the second-stage verdicts indicates that, notwithstanding the prosecutor's arguments, the jury was able to make nuanced determinations with respect to each count of conviction (for example, the jury found the existence of three aggravating factors with respect to the convictions pertaining to the murders of the three bank employees, but found the existence of only two aggravating factors with respect to the murder of a bank customer), and ultimately chose not to impose the death penalty on Johnson. In sum, we agree with the OCCA that the challenged prosecutorial comments did not render the second-stage proceedings fundamentally unfair.

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed June 28, 2006]

Case No. CIV-04-1602-L

ROBERT GRADY JOHNSON,
Petitioner,

v.

MIKE MULLIN, Warden,
Respondent.

ORDER

Petitioner, a state prisoner appearing through counsel, brings this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his convictions on four counts of murder in the commission of robbery with a dangerous weapon, for which he was sentenced to life without parole on each count. This matter is before the court for review of the Report and Recommendation entered by United States Magistrate Judge Doyle W. Argo on March 29, 2006. The Magistrate Judge recommends that the petition be denied.

The record reflects that petitioner has filed written objections to the Report and Recommendation. The court has carefully considered the petitioner's arguments, but determines that they are insufficient to justify overturning the conclusions of the Magistrate Judge in this matter.

Noting that petitioner's convictions now under challenge were affirmed in his appeal to the Oklahoma Court of Criminal Appeals ("OCCA"), the Magistrate Judge properly found that habeas relief may be awarded only if the OCCA's adjudication of his claims was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* Report and Recommendation, p. 7, *citing* 28 U.S.C. § 2254(d)(1) & (2). The Magistrate Judge thoroughly reviewed the procedural history of this case and carefully and correctly analyzed petitioner's thirteen claims for relief in light of the record.

In summary, having conducted a *de novo* review of the matter, the court finds that the Report and Recommendation should be adopted in its entirety. Therefore, the 28 U.S.C. § 2254 Petition for a Writ of Habeas Corpus is DENIED. This action is DISMISSED.

It is so ordered this 28th day of June, 2006.

/s/ Tim Leonard
TIM LEONARD
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed June 28, 2006]

Case No. CIV-04-1602-L

ROBERT GRADY JOHNSON,
Petitioner,

v.

MIKE MULLIN, Warden,
Respondent.

JUDGMENT

Pursuant to the order issued on this date, the petition for writ of habeas corpus is DENIED. This action is DISMISSED.

Entered this 28th day of June, 2006.

/s/ Tim Leonard
TIM LEONARD
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Filed March 29, 2006]

Case No. CIV-04-1602-L

ROBERT GRADY JOHNSON,
Petitioner,

vs.

MIKE MULLIN, Warden,
Respondent.

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing through counsel, brings this action pursuant to 28 U.S.C. § 2254 seeking a writ of habeas corpus. United States District Judge Stephen P. Friot referred the matter to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B).[1] A response to the petition has been filed, as well as a reply, and so the matter is at issue and ready for disposition. For the reasons stated herein, the undersigned recommends that the petition be denied.

I. Procedural History

Petitioner is challenging his convictions on four counts of murder in the commission of robbery with a dangerous weapon, for which he was sentenced to life

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[1] On March 29, 2005, Judge Friot transferred this action to United States District Judge Tim Leonard for all further proceedings.

without parole on each count.[2] Case No. CF-84-597, District Court of Comanche County. Petitioner filed his first application for habeas corpus relief in the United States District Court for the Eastern District of Oklahoma pursuant to 28 U.S.C. § 2254. The case was transferred to this Court on February 20, 1997. Case No. CIV-97-234-L. The case was dismissed without prejudice on a finding that Petitioner had not exhausted his claims in state court. Petitioner did not appeal the judgment.

Thereafter, on October 19, 1998, Petitioner filed a second application for habeas corpus relief in this Court. Case No. CIV-98-1453-L. Therein Petitioner sought to compel the State of Oklahoma to permit him a direct appeal from his convictions, asserting that his constitutional right to the effective assistance of counsel was violated because his appellate attorney failed to timely file a petition in error, resulting in the dismissal of his direct appeal by the Oklahoma Court of Criminal Appeals. This Court denied relief. *Id.* On appeal, the Tenth Circuit Court of Appeals concluded that Petitioner's first application for habeas corpus relief, Case No. CIV-97-234-L, had been improperly dismissed. *Johnson v. Champion*, 288 F.3d 1215, 1225-26 (10th Cir. 2002). The Court further concluded that Petitioner was denied the effective assistance of appellate counsel and ordered that he be granted a direct appeal out of time or be released from confinement. *Johnson*, 288 F.3d at 1230.

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[2] Petitioner was also convicted of three counts of shooting with the intent to kill and one count of attempted shooting. Petition, p. 2. Although he does not directly challenge those convictions, certain of the claims raised in his petition, if accepted by the Court, would invalidate those convictions as well.

Thereafter Petitioner filed his direct appeal with the Oklahoma Court of Criminal Appeals. Case No. F-2002-918, Oklahoma Court of Criminal Appeals. The Oklahoma Court of Criminal Appeals affirmed Petitioner's convictions and he sought relief in this Court by filing the instant 28 U.S.C. § 2254 petition. Petitioner did not seek post- conviction relief from either the District Court of Comanche County or the Oklahoma Court of Criminal Appeals.

Petitioner raises thirteen grounds for relief. In Ground One, Petitioner argues that no rational jury could have concluded beyond a reasonable doubt that he was present and participating in the bank robbery. Petition, p. 22-33. In Ground Two, Petitioner argues that his right to a fair trial was violated by the trial court's incomplete and misleading instructions on the crime of felony murder. Petition, p. 33-35. In Ground Three, Petitioner argues that he was denied a fair trial by the trial court's failure to give lesser included offense instructions. Petition, p. 35-38. In Ground Four, Petitioner argues that his rights under the Confrontation Clause were violated when the trial court refused to permit him to refresh the recollection of a witness. Petition, p. 38-43. In Ground Five, Petitioner asserts that he was denied a fair trial by the court's limitation on his cross-examination of a prosecution witness. Petition, p. 43-48. In Ground Six, Petitioner argues that he was denied a fair trial by the prosecutor's repeated, gratuitous and prejudicial comments on his sexual orientation. Petition, p. 48-54. In Ground Seven, Petitioner argues that the introduction of a second knife violated his right to a fair trial. Petition, p. 54-58. In Ground Eight, Petitioner argues that he was denied a fair trial as a result of prosecutorial misconduct regarding a sketch of the suspect. Petition,

p. 58- 61. In Ground Nine, Petitioner argues that prosecutorial misconduct deprived him of a fair trial by the introduction of improper evidence. Petition, p. 61-66. In Ground Ten, Petitioner argues that he was denied a fair trial through one-sided and indefensible evidentiary rulings. Petition, p. 66-79. In Ground Eleven, Petitioner argues that he was denied a fair trial when a juror was targeted and removed from the jury. Petition, p. 79-81. In Ground Twelve, Petitioner argues that he was denied a fair trial because the trial court refused to instruct the jury during sentencing that he could not be held accountable for co-defendant Jay Neill's actions. Petition, p. 82-84. In Ground Thirteen, Petitioner argues that the State's improper arguments during the sentencing phase deprived him of a fair trial. Petition, p. 84-88.

II. Background

On direct appeal, the Oklahoma Court of Criminal Appeals noted that the facts underlying Petitioner's convictions were set out in the direct appeal opinion of his former co-defendant, Jay Wesley Neill. Opinion, p. 1-2. Accordingly, unless otherwise stated herein, the following facts are taken from *Neill v. State*, 896 P.2d 537 (Okla. Crim. App. 1994).

During the Fall of 1984, Petitioner and Jay Neill shared an apartment in Lawton, Oklahoma. Mr. Neill attempted to support the men, while Petitioner stayed home. The men experienced financial difficulties, and therefore invited Rhonda Neff and her husband to move into the apartment to share expenses. Rhonda Neff was to buy groceries and Mr. Neill was to pay the rent. Eventually Mr. Neill fell behind on the rent and other bills. Mr. Neill purchased a car in September 1984, and defaulted

on his payments to General Motors Acceptance Corporation.

Petitioner and Mr. Neill had a joint checking account at the First Bank of Chattanooga, in Geronimo, Oklahoma (hereinafter "the bank"), which was not in good standing as the account had numerous checks written on it which had been returned due to insufficient funds. The bank was a small facility, housed in a prefabricated building. It had no security cameras and no guards.

On December 12, 1984, Mr. Neill visited a local pawnshop and inquired about purchasing a gun. He told the clerk that he had been receiving threats and needed the gun for protection. The different types of guns were explained to Mr. Neill and he was told that he needed a permit from the police department, which required the buyer to be twenty-one years old.

On December 13, 1984, Petitioner and Mr. Neill went to the K-Mart store in Lawton, The men first looked at guns, but after discovering that they were BB guns, the men purchased two large hunting knives. Mr. Neill went that morning to the Lawton airport and made arrangements for the two men to travel to San Francisco at approximately 6:30 p.m. on Friday December 14, 1984. Mr. Neill explained that he would pay for the tickets in cash on the date of travel.

At approximately 11:30 a.m. on December 13, 2004, Petitioner applied for a gun permit from the Lawton Police Department. A witness testified that Petitioner and Mr. Neill entered the bank at approximately 1:15 p.m. on December 13, 2004, and did not conduct any business or speak with any employee, they just looked around and talked amongst themselves.

On December 14, 1984, Petitioner and Mr. Neill returned to the pawnshop and asked to see the revolver that Mr. Neill had seen the day before. They were shown how to load and fire the gun and told the type of ammunition needed and where it could be purchased. They indicated they would return that afternoon with the gun permit.

Petitioner picked up his gun permit from the Lawton police department shortly before 11:30 a.m. on December 14, 1984. Petitioner and Mr. Neill returned to the pawn shop at 12:25 p.m. to purchase the gun. Because Petitioner was of legal age to purchase the gun, he showed the pawn shop owner his permit and filled out the necessary forms. Petitioner listed a post office box as his address rather than their apartment address. Prior to purchasing the gun, Petitioner and Mr. Neill had gone to Gibson's to purchase ammunition. Once inside, Mr. Neill chose the ammunition while Petitioner went in search of masking tape, which he indicated would be used to fill picture holes in the walls of their apartment. Again, because of his age Mr. Neill could not purchase the ammunition, so Petitioner completed the necessary form for the transaction, listing his former apartment as the address. The ammunition would not fit the gun, because the caliber of the gun had been erroneously marked on the tag at the pawnship. At approximately 12:30 p.m., Petitioner exchanged the ammunition for .32 caliber shells, this time using his post office box address.

Petitioner went to the apartment of his neighbor, Debbie Ward, to use the telephone at approximately 12:45 p.m. She was home on a break from her work, and was required to be at work by 1:00 p.m.

Petitioner used the telephone to contact the travel agent. He told the agent that Mr. Neill would be getting off work early, and they desired an earlier flight to San Francisco, preferably one leaving at 2:30. Petitioner and Mr. Neill were booked on the flight, even though the change required an upgrade to first class at a cost of $1200.00. Petitioner did not ask about the possibility of cheaper tickets.

The First Bank of Chattanooga in Geronimo, Oklahoma, was robbed on December 14, 1984, shortly after 1:00 p.m. According to one shooting victim, Marilyn Roach, there were two male voices in the bank at the time of the robbery and its attendant murders and shootings. Petitioner contends that he was unaware of the robbery and that he was at home cleaning the apartment when Mr. Neill returned at approximately 2:00 p.m., announced that he had killed seven or eight people, and told Petitioner that they needed to leave.

Petitioner and Mr. Neill taped some of the proceeds of the robbery to their waists before leaving for the airport, where they almost missed their flight to San Francisco. Once in San Francisco Petitioner and Mr. Neill spent portions of the robbery money on shopping, dining and partying. They were both arrested on December 16, 1984, Petitioner contending that he was unaware exactly how Mr. Neill obtained the money, although he was aware that Mr. Neill was attempting to cash a forged check he had stolen from Rhonda Neff before they had left Oklahoma.

Additional facts will be set forth herein as necessary to Petitioner's specific propositions of error.

III. STANDARD GOVERNING PETITIONS FOR HABEAS CORPUS

For factual and legal issues that have already been adjudicated in state court, the Court may only grant a writ of habeas corpus if that adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d)(1) and (2).

A state court's determination is contrary to clearly established federal law where it applies a rule that contradicts the law set forth in Supreme Court cases, or confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state court's determination involves an unreasonable application of clearly established Supreme Court precedent if it identifies the correct governing legal principle from the Court's decisions, but unreasonably, applies that principle to the facts of the prisoner's case. *Id.* at 413; *see also Wiggins v. Smith*, 539 U.S. 510, 518-519 (2003). It is not enough that the state court applied clearly established federal law erroneously or incorrectly; the application must also be unreasonable. *Williams*, 529 U.S. at 410-11; *Valdez v. Bravo*, 373 F.3d 1093, 1096 (10th Cir.), *cert. denied*, 543 U.S. 1008 (2004). Further, "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). That presumption of correctness is rebuttable only "by clear and convincing evidence." *Id.*

IV. DISCUSSION

A. GROUND ONE

In Ground One, Petitioner argues that his conviction for murder is unconstitutional because no reasonable trier of fact could have found him guilty beyond a reasonable doubt in that there was no evidence that he actively participated in the robbery of the bank. On direct appeal the Oklahoma Court of Criminal Appeals noted that Petitioner's presence in the bank at the time of the robbery was the subject of controversy.

> The State's evidence showed [Petitioner] participated in the planning and commission of the robbery/homicides. [Petitioner] took the witness stand and denied being in the Bank and participating in the robbery/homicides.
>
> A conviction for felony-murder requires that the accused must have committed murder while in the commission of one of the enumerated felonies found in 21 0.S .Supp .1982, § 701.7(B). All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals and are equally. culpable with other principals. 21 0.S.1991, § 172. *See also Conover v. State*, 933 P.2d 904, 910-11 (Okla.Cr. 1997) Mere presence or acquiescence, without participation, does not constitute a crime. Id. However, only slight participation is needed to change a person's status from a mere spectator into an aider and abettor. *Id.* "Aiding and abetting in a crime requires the State to show the accused procured

> it to be done, or aids, assists, abets, advises or encourages the commission of the crime." *Id. quoting Hindman v. State*, 647 P.2d 456, 458 (Okla.Cr. 1982).

Opinion, p. 2-3. After summarizing the evidence presented against Petitioner, the Oklahoma Court of Criminal Appeals concluded:

> This evidence showed [Petitioner] fully participated in the planning and execution of the robbery/homicides. Although [Petitioner] was not identified by any witnesses as being inside the Bank with Neill, his conduct leading up to the robbery/homicides, and his conduct after the crimes, creates a reasonable inference that his was the other voice heard by Marilyn Roach inside the bank. This evidence is sufficient to find [Petitioner] guilty as a principal to felony-murder.

Opinion, p. 8-9. The Oklahoma Court of Criminal Appeals continued by addressing Petitioner's argument that "the aider and abettor rule cannot be aggregated with the felony murder rule to allow a conviction for felony-murder when the defendant was not present during the commission of the underlying felony." Opinion, p. 9. In rejecting this argument the Oklahoma Court of Criminal Appeals noted that the aider and abettor rule has been applied to the get-away car driver in a felony murder case, even though the driver had not entered the premises to participate in the assault on the victim. Opinion, p. 9-10.

Petitioner contends that the Oklahoma Court of Criminal Appeals' decision was contrary to or an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979). In reviewing the sufficiency

of the evidence for purposes of habeas corpus relief, *Jackson* provides that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." Id. at 319; *see also Romano v. Gibson*, 239 F.3d 1156, 1164 (10th Cir. 2001). In applying this standard, the reviewing court may not weigh conflicting evidence or consider the credibility of witnesses. *Grubbs v. Hannigan*, 982 F.2d 1483, 1487 (10th Cir. 1993). Rather, the court must "accept the jury's resolution of the evidence as long as it is within the bounds of reason." *Id.*

An even more limited review is required by 28 U.S.C. § 2254(d) where, as here, a habeas petitioner's sufficiency of the evidence challenge has already been decided on the merits in state court. *Valdez v. Ward*, 219 F. 3d 1222, 1237 (10th Cir. 2000). Pursuant to § 2254(d), Petitioner is not entitled to relief unless the Oklahoma Court of Criminal Appeals' determination that there was sufficient evidence was unreasonable. *Torres v. Mullin*, 317 F.3d 1145, 1151 (10th Cir. 2003). "That amounts to deference squared." *Torres v. Lytle*, No. 03-2098, 2004 WL 103557 at *2 (10th Cir. Jan. 23, 2004).[3]

In determining whether the Oklahoma Court of Criminal Appeals was reasonable in finding the evidence sufficient to support Petitioner's convictions, the Court must start with Oklahoma law defining the substantive elements of the crime. *Jackson*, 443 U.S.

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[3] This and any other unpublished disposition are cited for persuasive authority pursuant to Tenth Circuit Rule 36.3.

at 324 n.16. The version of Okla. Stat. tit. 21 § 701.7B in effect in 1984, provided in pertinent part:

> A person . . . commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of . . . robbery with a dangerous weapon.

In reviewing this claim the undersigned has made a thorough review of the entire transcripts. This review combined with the requirement that the Court construe the facts in the light most favorable to the prosecution reveals the following evidence of Petitioner's guilt:

In the days leading up to the December 14, 1984 robbery of the First Bank of Chattanooga, Petitioner and Mr. Neill embarked on a course of action that would end with their arrest in San Francisco on December 16, 1984. Despite having no money in their joint checking account and facing eviction and the repossession of a car recently purchased by Mr. Neill, the two men went on a spending spree on Sunday, December 9, 1984. Together they chose clothing and jewelry from a department store, purchasing in excess of $900.00 worth of items by writing a check that they knew their account could not cover. While shopping Mr. Neill asked the clerk, who was also a travel agent, about trips to the Bahamas and San Francisco.

On the next night, without having deposited any funds into their account, Petitioner and Mr. Neill dined at Red Lobster, paying their bill with a check that could not be honored. Over dinner at Red Lobster on that night, December 10, 1984, Mr. Neill mentioned his plan to rob the First Bank of Chattanooga, a plan he had mentioned in November 1984,

to Petitioner and a friend over dinner. On Wednesday December 12, 1984, Mr. Neill selected a gun from a pawn shop, but he could not purchase it because of his age. Petitioner and Mr. Neill again dined at Red Lobster, paying with a bad check.

At approximately 11:30 a.m. on December 13, 1984, Petitioner went to the Lawton Police Department and applied for a gun permit, providing a post office box in support of his application rather than his residential address, and stating that he lived alone in an apartment as the reason he wanted to obtain a gun.[4] Mr. Neill was at the Lawton Airport on Thursday, making travel plans for he and Petitioner to go to San Francisco. He informed the travel agent that he would pay for the trip with cash upon their departure. Both men were seen at the bank at 1:30 p.m., one day before the robbery at the approximate time of the robbery, looking around but not conducting any business. At 2:00 p.m., Mr. Neill and Petitioner went to K-Mart and looked at guns. Upon learning that the guns were only BB guns, the men purchased two hunting knives, again using a bad check.

On Friday December 14, 1984, at approximately 10:00 a.m., Petitioner and Mr. Neill went to the pawn shop and Mr. Neill asked the shop owner to hold the gun that he had selected on Wednesday. Petitioner returned to the Lawton Police Department and retrieved his gun permit. Petitioner and Mr. Neill went to. Gibson's, a local sporting goods store, where

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[4] Petitioner informed Agent Knowlton of the Federal Bureau of Investigation that Mr. Neill had told him on Thursday of his plan to rob a bank and asked that he obtain a gun permit and gun for Mr. Neill to use in the robbery.

they purchased ammunition for a .38 caliber gun and a roll of masking tape. The men then returned to the pawn shop with Petitioner's gun permit and purchased the .32 caliber gun that had been held back, which had mistakenly been labeled as a .38 caliber. Shortly thereafter Petitioner ran back into Gibson's in a "tremendous hurry," to exchange the ammunition for the proper size.

Shortly before 1:00 p.m. Petitioner telephoned the travel agent from his neighbor's apartment and told the agent to change the reservations to an earlier flight, stating that money was no object and that payment would be made upon their arrival at the airport. Petitioner told the agent that Mr. Neill would be getting off work early that day.

The bank was robbed at approximately 1:30 p.m. Three bank employees, Kay Bruno, Joyce Mullenix, and Jeri Bowles were stabbed to death, with more than seventy stab wounds, with several of those wounds described as "decapitation" type wounds. One of the knives purchased by Petitioner and Mr. Neill was found in the bank with blood on its handle consistent with that of Kay Bruno. The other knife was found in Mr. Neill and Petitioner's car at the Lawton Airport, visible from outside the car on the passenger side. It too contained blood consistent with Ms. Bruno and with one of the other victims. Ralph Zeller was killed during the robbery by two gunshot wounds to the head. Marilyn Roach, Bellen Robles and her husband, Ruben Robles, were shot, although their wounds were not fatal.

The gun used in the robbery was identified as the one Petitioner purchased from the pawn shop on December 14, 1984. Marilyn Roach testified that she heard two voices during the robbery, one stating "I

thought I told you not to shoot anybody." The other responding, "well they moved." Belien Robles testified that she heard the cash drawers opening and closing within seconds of the last shot being fired. Herman Williams, a jailhouse informant, testified that Petitioner told him that Petitioner and Mr. Neill had planned the robbery and murders, intending that there would be no survivors.

At their apartment, Petitioner and Mr. Neill taped some of the proceeds of the robbery to their bodies, using the masking tape purchased by Petitioner earlier that day. Petitioner, accompanied by Mr. Neill, discarded the gun in a pond in Lawton, en route to the airport. Neither man was distraught at the Lawton Airport, where they paid cash for their first class tickets to San Francisco and conversed with a travel agent, the one who also worked at the department store. Once in San Francisco the men spent some of the proceeds of the robbery on shopping and entertainment. Some of the money from the robbery was recovered from their hotel room when they were arrested on December 16, 1984.

These facts, taken together, are sufficient to support a finding that Petitioner was present during the course of the robbery of the bank and participated in the robbery and murders.[5] Accordingly, the Oklahoma Court of Criminal Appeals' application of

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[5] Petitioner makes reference to the testimony by Karen Nobis' mother-in-law regarding a statement by Karen Nobis, the juror removed between the guilt phase and the penalty phase of Petitioner's trial, that no juror believed Petitioner was in the bank at the time of the robbery. Tr. Vol. IX, p. 2552. There was no admissible evidence of any such conclusion presented either during trial or in any subsequent proceedings.

Jackson was not unreasonable, and habeas corpus relief should be denied on this claim.

Furthermore, regardless of whether there was sufficient evidence to establish that Petitioner was present in the bank and participating in the robbery, there was sufficient evidence to find him guilty as an aider and abettor. Petitioner contends that the Oklahoma Court of Criminal Appeals erred in its consideration of this aspect of his case, because no person has ever been held responsible for felony murder without being physically present at the scene of the crime.

Oklahoma law designates as a principal any person who aids and abets in the commission of a crime. Okla. Stat. tit. 21 § 172. The Oklahoma Court of Criminal Appeals is free to determine that aiding and abetting a robbery that culminates in murder is sufficient to hold a person liable as a principal in the felony murder premised on that robbery. It is not this Court's role to challenge the Oklahoma Court of Criminal Appeals' interpretation of Oklahoma law. The Supreme Court has "repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, __ U.S. __, 126 S.Ct. 602, 604 (2005). Although Petitioner cites to numerous cases holding people liable who were actually present during the underlying felony, none of the Oklahoma cases addressed the question raised herein. Accordingly, Petitioner's reliance on these factually distinguishable cases does not support the granting of habeas corpus relief.

In addition to the evidence set forth above, the Oklahoma Court of Criminal Appeals also noted the following facts in support of Petitioner's guilt:

> [I]n mid-November 1984, co-defendant Neill, with [Petitioner] standing next to him, told a friend they were going to rob the Bank because it did not have any security cameras or guards.
>
> Prior to December 1984, [Petitioner] told several friends of the severe financial problems he and Neill were experiencing. The week before the crimes, [Petitioner] appeared to his neighbors to be nervous and upset. On Sunday December 9, [Petitioner] and Neill purchased over $900.00 worth of clothes and jewelry. The next night, [Petitioner] and Neill went to dinner at a local restaurant. Neill again mentioned robbing the Bank as a way to solve their financial problems.

Opinion, p. 3-4. In conjunction with the evidence set forth above, it is clear that there was ample evidence presented to hold Petitioner liable as an aider and abettor in the robbery during which the four murders occurred.

In this context the case is similar to *Chaney v. Brown*, 730 F.2d 1334 (10th Cir. 1984). Mr. Chaney challenged his first degree murder conviction on the theory that exculpatory evidence was withheld in violation of his rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Chaney argued that the evidence was exculpatory because certain of the statements given to investigating agents indicated that another person might be involved in the murder for which he had been convicted. The Tenth Circuit concluded that the evidence was not exculpatory with regard to Mr. Chaney's guilt, because it merely indicated that

another person or persons might be involved,not that he was innocent.

> Considering the theory of responsibility under the aider and abettor statute, together with the Oklahoma felony murder statute, the conviction of Chaney for first degree murder is supported by Oklahoma law and by the strong circumstantial evidence showing Chaney's participation at least as an aider and abettor in the kidnapping, during which Mrs. Ashmore's murder occurred

Chaney, 730 F.2d at 1350 (citations omitted). The facts in the light most favorable to the prosecution and set forth above were sufficient to hold Petitioner liable for the robbery of the bank and the murders committed in the course thereof, even without any evidence that he was present at the Bank.

Finally, Petitioner's attempt to challenge the validity of the Oklahoma Court of Criminal Appeals interpretation of Oklahoma's felony murder statute is without support. The undersigned questions whether this claim, which is in response to the Oklahoma Court of Criminal Appeals' decision on direct appeal, has been fairly presented to that Court for consideration. Essentially Petitioner contends that he did not have adequate notice as required by the federal constitution that his alleged conduct would amount to felony murder. Petition, p. 31-33. Notwithstanding Petitioner's arguments to the contrary, the plain language of the felony murder statute and the aiding and abetting statute give sufficient notice that his actions were criminal and would amount to felony murder.

Accordingly, the undersigned recommends that habeas corpus relief be denied on Ground One be-

cause Petitioner has not established that the Oklahoma Court of Criminal Appeals' decision on this issue was contrary to or an unreasonable application of *Jackson*.[6] Accordingly, habeas corpus relief should be denied on Ground One.

B. GROUND TWO

In Ground Two, Petitioner argues that the trial court's instructions to the jury were legally insufficient. Specifically, Petitioner asserts that the jury should have been instructed that he could not be found guilty of murder unless the State proved beyond a reasonable doubt that he was present at the bank during the robbery.

A petitioner seeking collaterally to attack a state court conviction based on an erroneous set of jury instructions "bears a heavy burden of proof." *Shafer v. Stratton*, 906 F.2d 506, 508 (10th Cir. 1990). "Habeas proceedings may not be used to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense," *Id.* at 508 (quotation omitted), or "so infected

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[6] Petitioner's reliance on *Anderson v. State*, 91 P.2d 794 (Okla. Crim. App. 1939), is misplaced. In *Anderson*, the Court noted that

> a mere mental assent to or acquiescence in the commission of a crime by one who did not procure or advise its perpetration, who takes no part therein, gives no counsel and utters no word of encouragement to the perpetrator, however wrong morally, does not in law constitute such person a participant in the crime.

Id. at 797 (citations omitted). In this case there is ample evidence that Petitioner took part in the robbery through its preparation and the facts attendant thereto.

the entire trial that the resulting conviction violates due process,'" *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)).

Petitioner's Ground Two argument is entirely dependent on his first claim for relief, because he argues that the jury instructions did not require that the jury find that he was present at the bank at the time of the robbery. Because Petitioner is not entitled to relief on Ground One, he is similarly not entitled to relief on this ground. The jury instructions properly informed the jury regarding the elements the State was required to prove in order for the jury to find Petitioner guilty. Accordingly, the undersigned recommends that habeas corpus relief be denied on. Ground Two.

C. GROUND THREE

In Ground Three, Petitioner contends that the Oklahoma Court of Criminal Appeals' determination that he was not entitled to lesser included offense instructions on bank robbery was contrary to or an unreasonable application of *Beck v. Alabama*, 447 U.S. 625 (1980). In his reply brief, Petitioner raises a new argument, asserting that he is entitled to relief pursuant to *Hill v. United States*, 368 U.S. 424 (1962).

Respondent contends that this issue was not fairly presented to the Oklahoma Court of Criminal Appeals because Petitioner did not cite to *Beck*. Respondent did not have an opportunity to address Petitioner's reliance on *Hill* or to argue that Petitioner has not exhausted that claim. The undersigned need not address the issue of exhaustion, because Petitioner's claim lacks merit regardless of whether

he relies on *Beck* or *Hill* to support his claim that the trial court's failure to instruct the jury on the lesser included offense of robbery violated his constitutional rights. *See* 28 U.S.C. § 2254(b)(2).

Petitioner's attempt to rely on *Beck* has been squarely foreclosed by the Tenth Circuit Court of Appeals' decision in *Trujillo v. Sullivan*, 815 F.2d 597 (10th Cir. 1987). In *Trujillo*, the Court held that "the capital case in which the death penalty is not ultimately imposed appears to be more like the non-capital case than the death sentence case in which eighth amendment values are clearly implicated; unless the defendant is actually sentenced to death, the eighth amendment is not directly implicated." *Id.* at 602. The Court concluded that *Beck* is a case grounded in the Eighth Amendment, and that it has no place in non-capital cases. Although Petitioner takes issue with the Tenth Circuit's determination that a case in which the State seeks the death penalty is not a capital case for habeas corpus purposes unless a death sentence is imposed, this Court is not free to review that decision. This Court may not depart from controlling legal authority clearly set forth in a published decision of the Tenth Circuit Court of Appeals. *See United States v. Spedalieri*, 910 F.2d 707, 709 n. 2 (10th Cir. 1990) ("[a] district court must follow the precedent of this circuit") (citations omitted). Accordingly, the Oklahoma Court of Criminal Appeals' decision was not contrary to or an unreasonable application of clearly established Supreme Court precedent as set forth in *Beck* and Petitioner is not entitled to relief on this basis.

When confronted with *Trujillo*, Petitioner shifts his reliance to *Hill*, cited by the Court in *Trujillo* as

providing a due process basis for challenging a trial court's failure to instruct the jury on lesser included offenses. *Trujillo*, 815 F.2d at 603. As the Tenth Circuit subsequently noted, "[u]nder *Trujillo*, this is a *non* capital conviction to be affirmed unless 'the evidence so overwhelmingly supports a lesser included offense instruction' that its absence was a 'fundamental miscarriage of justice." *Turner v. Champion*, No. 97-6018, 1997 WL 740794, *2 (10th Cir. Dec. 2, 1997) (quoting *Trujillo*, 815 F.3d at 603-04). In this case, however, the failure to give the instructions was not a fundamental miscarriage of justice.

This conclusion rests, in part, on the recommendation made above with regard to Petitioner's first argument. Petitioner would have this Court conclude that despite having fully participated in the planning and preparation for a robbery, that he could only be held responsible for the robbery and not for its attendant murders. However, before lesser included offense instructions are mandated by the due process clause and *Hill*, the Court must conclude that had such instructions been given, the jury rationally could have acquitted Petitioner of the greater offense and found him guilty of the lesser offense. *See Keeble v. United States*, 412 U.S. 205 (1973). Under the facts of this case, and likely most cases challenging a felony murder conviction based on a robbery, such a conclusion is not possible. Petitioner was found guilty of felony murder based on robbery, because in the course of the robbery in which he was a participant, people were killed. As noted repeatedly above, there is no requirement under Oklahoma law that a person be physically present at the time of the murders to be held criminally responsible. Here, to find Petitioner guilty of robbery

but to acquit him of felony murder would have required the jury to employ a legal fiction. There is no evidence that the deaths inside of the bank did not occur during the commission of the robbery. Thus, to be involved in this particular robbery was to be involved in the murders. Felony murder is a general intent crime, the robbery and the deaths in the course thereof are the key elements. *See Kinchion v. State*, 81 P.3d 681, 686 (Okla.Crim.App. 2003) (Chapel, J, dissenting)(the primary function of the felony murder statute is to "remove the State's burden of proving malice by imputing the intent involved in the commission of the felony to the commission of the homicide."). Even accepting Petitioner's theory that he did not anticipate the deaths does not remove culpability, because after purchasing a gun and knives and permitting Mr. Neill to take those with him to the bank, the death of bank workers and customers was foreseeable. Accordingly, because the jury could not have acquitted Petitioner of felony murder while at the same time finding him guilty of robbery, *Hill* and the due process clause did not require that the judge instruct the jury on robbery. Petitioner has not established that the Oklahoma Court of Criminal Appeals' decision was contrary to or an unreasonable application of clearly established Supreme Court law. Accordingly, the undersigned recommends that habeas corpus relief be denied on Ground Three.

D. GROUND FOUR

In Ground Four, Petitioner argues that his rights under the Confrontation Clause were violated because the trial court refused to allow defense counsel to refresh Debbie Ward's recollection with her prior testimony. On direct appeal the Oklahoma Court of

Criminal Appeals acknowledged that the trial court committed error, but concluded that the error was harmless. Opinion, p. 19-21.

Debbie Ward was Petitioner's across-the-hall neighbor in the apartment complex. On the date of the bank robbery Petitioner went to her apartment to use the telephone. At Mr. Neill's second trial, held before Petitioner's retrial, Ms. Ward apparently testified that she left her apartment, and that Petitioner walked out with her at a few minutes after 1:00 p.m. At Petitioner's second trial she testified that they left "real close to 1:00 o'clock" p.m. Tr. Vol. V, p. 1427. She confirmed that it could have been 12:55 p.m., testimony she had given at a previous time. Tr. Vol. V, p. 1427. Defense counsel sought to challenge the testimony at Petitioner's trial with her earlier testimony

Q: (defense counsel) And do you recall that Mr. Schulte asked you this referring to the afternoon of Friday, December 14, 1984. "What time did you leave to go back to work, as best you can recall." Do you recall that he asked you that?

A: Yes.
Q: Do you recall that you responded I probably left the apartment about two or three minutes after 1:00 o'clock. Do you recall that you said that?
A: No, I don't recall saying that.
Q: You don't recall that you said that?
A: No, I don't.
Q: Okay. Would it refresh your recollection if I showed you the transcript?
A: Sure.

Tr. Vol. V, p. 1435. When defense counsel sought to approach the witness the prosecutor objected, be-

cause the witness did not recall her testimony after hearing it read by counsel. Tr. Vol. V, p. 1435. The judge sustained the objection. Tr. Vol. V, p 1435-36. As noted, the Oklahoma Court of Criminal Appeals concluded that pursuant to Oklahoma's evidentiary rules that counsel should have been permitted to refresh the witness' memory regarding her testimony. Petitioner argued on direct appeal, as he does here, that the timing of his visit to Ms. Ward's apartment was a critical issue, because based on her testimony at Mr. Neill's trial, Petitioner would not have had time to get to the bank by 1:15 to 1:30 p.m., the time of the robbery. Her testimony at Petitioner's trial increased his travel time by a few minutes, which he asserts would have made a difference in his ability to travel the distance between his residence and the bank.

As the Oklahoma Court of Criminal Appeals noted, this issue is only critical if Petitioner's conviction rises and falls on his presence at the bank at the time of the robbery. However, as concluded above, and as found by the Oklahoma Court of Criminal Appeals, Petitioner's presence during the actual robbery was not required in order for him to be held liable under Oklahoma law. Because the Court had found that Petitioner "can legally be held criminally liable for the robbery/homicides even if he had not been in the Bank at the actual time of the robbery/homicides," it concluded that Petitioner was not prejudiced by the trial court's error. Opinion, p. 20-21.

In addressing Petitioner's claim, the undersigned notes that the Oklahoma Court of Criminal Appeals did not apply the harmless error standard of *Chapman v. California*, 386 U.S. 18, 24 (1967), or *Brecht v. Abrahamson*, 507 U.S. 619 (1993), but rather

concluded that Petitioner had not established that he was prejudiced by the error. This does not undermine the undersigned's confidence in the Oklahoma Court of Criminal Appeals' decision, which was premised not on the Confrontation Clause of the federal Constitution, but rather on Oklahoma statutory law. Because the Oklahoma Court of Criminal Appeals did not utilize the federal harmless error standard, however, this Court must, if it finds an error of constitutional magnitude, apply the standard set forth in *Brecht*. *See Penry v. Johnson*, 532 U.S. 782 (2001)(a federal habeas court is to apply the *Brecht* standard to a habeas petition governed by the AEDPA even when the state court has not assessed a constitutional error for harmlessness under *Chapman*). Pursuant to *Brecht*, habeas corpus relief is warranted only if the error has "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. With that standard in mind, the undersigned turns to the substantive issue.

"Federal habeas review is not available to correct state law evidentiary errors; rather it is limited to violations of constitutional rights." *Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir.1999) (citing *Estelle*, 502 U.S. at 67-68). Accordingly, the fact that the trial court erred under Oklahoma law does not answer the Confrontation Clause issue.

> "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about . . . harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S.

673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). Generally, "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Id.* at 680, 106 S.Ct. at 1436.

Matthews v. Price, 83 F.3d 328, 332-33 (10th Cir. 1996). Here, Petitioner is arguing about the inconsistencies in Ms. Ward's testimony. Although counsel was not permitted to question Ms. Ward by utilizing her prior testimony, it is clear from the record that the jury was made aware that her testimony regarding the time she left her apartment on December 14, 1984 had not been entirely consistent. Petitioner's counsel was permitted to ask Ms. Ward if she recalled telling counsel that she was a few minutes late that day when she returned to work from lunch. Tr. Vol. V, p. 1437. She responded affirmatively, noting that she remembered telling him that she was a few minutes late. Tr. Vol. V, p. 1437-38. Accordingly, although the Oklahoma Court of Criminal Appeals concluded that the trial court's refusal to permit Petitioner's counsel to utilize Ms. Ward's prior testimony to refresh her recollection was error under state law, Petitioner has failed to establish that it violated his rights under the Confrontation Clause because he was permitted to establish that Ms. Ward's recollection about the timing of her return to work on that day was unclear.

Furthermore, even assuming that the trial judge's erroneous ruling implicated Petitioner's rights under the Confrontation Clause, the undersigned concludes that the limitation did not have a "substantial and

injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Because Petitioner's physical presence in the bank was not required in order for the jury to find him guilty, by virtue of his earlier participation, e.g. his purchase of the knives, acquisition of the gun permit, purchase of the gun and ammunition, the trial court's ruling that precluded counsel from refreshing Ms. Ward's recollection did not have a substantial and injurious effect or influence the verdict. Accordingly, Petitioner is not entitled to habeas corpus relief on Ground Four.

E. GROUND FIVE

In Ground Five, Petitioner argues that the trial court violated his rights under the Confrontation Clause by refusing to permit his counsel to cross-examine Steven Murphy with the testimony of Denise Donahue on the issue of whether Jay Neill and Petitioner were in the bank the day before the robbery, casing the bank. Steven Murphy maintained an insurance office inside the bank. He testified that he saw Petitioner and Mr. Neil enter the bank at 1:20 p.m. on December 13, 1984, the approximate time of the robbery the next day. Tr. Vol. V, p. 1401-02, 1404. Petitioner's counsel sought to cross-examine Mr. Murphy with the testimony of Ms. Donahue, the employee at the airport who booked the trip for Mr. Neill and Petitioner. Tr. Vol. V, p. 1409. According to Ms. Donahue's testimony Mr. Neill was alone at the airport making the trip arrangements, and his tickets were processed at 12:55 p.m. Tr. Vol. IV, p. 1165. The trial court refused Petitioner's attempt to challenge

Mr. Murphy's testimony with Ms. Donahue's earlier testimony. Tr. Vol. V, p. 1409.[7]

In considering the claim on direct appeal the Oklahoma Court of Criminal Appeals summarized Denise Donahue's testimony, that Neill had arrived at around 11:00 a.m., that the reservations were entered into the computer at 12:55 p.m., and that at some point in their conversation Mr. Neill and Ms. Donahue had discussed hotels and limousine service. Opinion, p. 17. The Court noted that Ms. Donahue estimated she spent 45 minutes to an hour with Mr. Neill after making the flight arrangements, but then she acknowledged that her prior testimony was consistent that Mr. Neill arrived at 11:00 a.m. and remained with her for about two hours. After reviewing the evidence the Oklahoma Court of Crim-

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[7] Petitioner's counsel propounded the following question to Mr. Murphy:

> Q: Defendant's Exhibit 47 is a photostat of a flight reservation that Jay Neill made on December 13. I would show you that it shows the transaction for completing making those flight reservations was completed at 12:55 p.m. This evidence was offered through a woman Denise Donahue. My question to you would be this, sir. If on Friday of this week—I believe she testified last week—I believe Ms. Donahue testified that she completed making Neill's flight reservations by 12:55 p.m. and if she further testified that he remain (sic) with her for forty-five minutes to an hour—

Tr. Vol. V, p. 1408-09. The Court sustained an objection to the question. The Court concluded that counsel was not correctly summarizing Ms. Donahue's testimony. Tr. Vol. V, p. 1409. The discussion continued outside the presence of the jury after the court reporter read the controverted testimony. Tr. Vol. V, p. 1410-11. The Court sustained the objection, finding that Ms. Donahue's testimony was not accurately characterized. Tr. Vol. V, p. 1411.

inal Appeals concluded that the trial court's ruling did not violate Petitioner's rights under the Confrontation Clause or his due process rights. Opinion, p. 17-18.

> Both Ms. Donahue and Mr, Murphy testified and were subject to cross-examination by defense counsel. Their individual testimonies, including any inconsistencies, were before the jury for their consideration. The right of cross-examination does not extend to asking one witness to comment on the veracity of another witnesses' trial testimony. The inconsistency in the testimony of witnesses is the subject of closing argument by counsel, not a proper subject for cross-examination. Further, no relevant or material evidence was excluded by the court's limitation, of cross-examination.

Opinion, p. 18. Petitioner contends this ruling was in error, because cross-examination is the principal method for determining the credibility of witnesses.

Petitioner is correct in his general assertion of the law. Indeed, Mr. Murphy was subject to strong cross-examination by Petitioner's counsel. However, as noted above, a criminal defendant does not have an unlimited right to cross-examine witnesses and the right of the cross-examination Petitioner sought to utilize in trial was not directed at determining whether Mr. Murphy had a motive for lying. Petitioner sought to have one witness comment on the veracity of another witness, with no basis for knowledge of how the other witness had testified. Mr. Murphy and Ms. Donahue are not alleged to have known one another or to have both been present during a single interaction with Petitioner or Mr. Neill. As the Oklahoma Court of Criminal Appeals

noted, the discrepancies in the testimony of Ms. Donahue and Mr. Murphy was a topic more appropriate for closing argument. Regardless, the relative credibility of one witness versus another is a province for the jury, which was appropriately instructed on how to assess the credibility of witnesses, and it was abundantly clear from the testimony presented that a conflict existed between Mr. Murphy's testimony and that of Ms. Donohue regarding where Mr. Neill was on Thursday December 13, 1984 at approximately 1:20 p.m, a conflict that was for the jury to resolve.

In light of the jury's role as arbiter of credibility and the fact that both Mr. Murphy and Ms. Donohue were subject to cross-examination designed to determine their veracity, the undersigned concludes that the limitation on cross-examination of Mr. Murphy did not render his trial fundamentally unfair. Petitioner has not established that the Oklahoma Court of Criminal Appeals' decision in this regard was contrary to or an unreasonable application of clearly established federal law, and accordingly, the undersigned recommends that habeas corpus relief be denied on Ground Five.

F. GROUND SIX

In Ground Six, Petitioner argues that he was deprived of a fair trial because of the prosecutor's "repeated, gratuitous, and prejudicial comments on his sexual orientation." Petitioner's Brief, p. 48. Petitioner complains that the prosecutor infected the trial by referring to the fact that Mr. Neill and Petitioner went to a gay area of San Francisco. Tr. Vol. IV, p. 987. Petitioner further complains about comments by the prosecutor that the men went to gay bars and planned to stay at a gay hotel. Tr. Vol. V,

p. 1484, Vol. VIII, p. 2122. Petitioner contends that these comments rendered his trial unfair.

Not every improper or unfair remark made by a prosecutor will amount to a federal constitutional deprivation. *See Caldwell v. Mississippi*, 472 U.S. 320, 338 (1985) (plurality). A prosecutor's improper comment or argument warrants habeas corpus relief only where the remark "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 645, (1974).

The comments about which Petitioner complains are three comments in a trial that lasted from July 12 until July 28, 1993. Specifically, Petitioner complains that the prosecutor referenced Petitioner and Mr. Neill going to a "gay area" of San Francisco, to "gay bars" and staying at a "gay hotel."

The undersigned finds that these isolated comments in a trial this long did not deprive Petitioner of his constitutional rights. Petitioner's strategy throughout this trial was to show that he was the submissive member of a homosexual couple and that Mr. Neill, the dominant member, directed his actions both before and after the robbery. This strategy is evident from Petitioner's attorneys' questioning during voir dire, from their opening statement, and from their examination and cross-examination of witnesses during trial.

In *Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001), the Tenth Circuit found certain comments regarding Mr. Neill's sexuality to be inflammatory and unnecessary. However, the comments about which Mr. Neill complained in his habeas corpus proceeding were of a different tone. In *Neill*, the prosecutor's

comments were made during the death penalty closing argument and sounded like an argument in favor of the death penalty based on Mr. Neill's sexuality. The prosecutor argued to the jury that they were "deciding life or death on a person that's a vowed (sic) homosexual." *Id.* at 1060. The Tenth Circuit found that this comment and other similar ones that were much more inflammatory than those about which Petitioner complains did not deprive Mr. Neill of a fair trial. *Id.* at 1062. Notably, with regard to complaints by Mr. Neill regarding the prosecutor's comments that he was acting out of fear, including fear of losing his relationship with Petitioner, the Court ruled that the comments were accurate in light of the evidence and relevant to the theory of the defense. *Id.* at 1060.

In light of the nature of the defense proffered by Petitioner, the undersigned cannot conclude that the comments about a gay portion of the city, gay hotels and gay bars so infected the trial with unfairness as to make Petitioner's conviction a denial of due process. Accordingly, the undersigned recommends that habeas corpus relief be denied on Ground Six.

G. GROUND SEVEN

In Ground Seven, Petitioner argues that his right to a fair trial was violated by the State's introduction of a second "bloody" knife. Petitioner contends that the medical examiner took a knife that was clean when it was retrieved from the scene of the bank on the day of the murder and inserted it into one of the victim's bodies. When the knife was sent to the Federal Bureau of Investigation laboratory in Washington, D.C., it was tested for blood and the blood found was consistent with that of one of the victim's. Petitioner contends that the introduction of the knife

was prejudicial because it permitted the jury to conclude that there were two people at the bank, when in fact, the medical examiner admitted that he had exposed the second knife to the victim's blood.

On direct appeal, the Oklahoma Court of Criminal Appeals noted the history regarding the knife and the dispute at trial regarding its admissibility. To summarize, the trial court conducted a bench conference where Petitioner's counsel argued that the evidence raised serious questions regarding the integrity of the testing of the knife and the chain of custody. Tr. Vol. VI, p. 1550-54. The trial court permitted introduction of the knife, concluding that there was no question that the knife was found at the bank, and thus it was admissible. Tr. Vol. VI, p. 1554. The Oklahoma Court of Criminal Appeals concluded:

> Here the State's evidence showed the knife was substantially in the same condition at the time of offering as when it was found in the Bank. At best, the record offers only speculation that the knife might have been tampered with prior to its examination by the FBI. Therefore, the trial court properly admitted the evidence with any doubts going to the weight to be given the evidence by the jury. Accordingly, this assignment of error is denied.

Opinion, p. 36.

"Federal habeas review is not available to correct state law evidentiary errors; rather it is limited to violations of constitutional rights." *Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir.1999) (citing *Estelle*, 502 U.S. at 67-68). Federal courts may not interfere with state evidentiary rulings unless the rulings in question rendered "the trial so funda-

mentally unfair as to constitute a denial of federal constitutional rights." *Tucker v. Makowski*, 883 F.2d 877, 881 (10th Cir.1989) (quotations and citations omitted).

There were two knives associated with the bank robbery. One knife, the source of the controversy, was found at the bank by Agent Arnold Bentz of the Oklahoma State Bureau of Investigation. Tr. Vol. V, p. 1450, 1459. Agent Bentz testified that when he recovered the knife there was blood on the handle, but he did not see any on the blade. Tr. Vol. V, p. 1467. The second knife was found in Mr. Neill's car at the Lawton airport by Agent Lawrence G. Cincotta of the Federal Bureau of Investigation. Tr. Vol. VI, p. 1498. That knife had dried blood and hair on the blade and handle. Tr. Vol. VI, p. 1527. The acrylic fibers taken from this knife were consistent with clothing worn by two victims, Jerri Bowles and Kay Bruno. Tr. Vol. VI, p. 1528. Federal Bureau of Investigation agent William Eubanks testified that the blood on the knife from the bank could have come from Ms. Bruno. Tr. Vol. VI, p. 1539. Agent Eubanks testified that the knife from the bank had a clean blade, and that the blood for his testing was taken from the handle area. Tr. Vol. VI, p. 1540-41. He testified that blood on the knife found in the car was consistent with that of the victims Bowles and Bruno. Tr. Vol. VI, p. 1538.

On examination of the medical examiner, Richard Boatsman, M.D., Petitioner's counsel asked whether Dr. Boatsman had testified in Petitioner's first trial that he inserted the knife found at the bank, the knife with the clean blade, into one of the bodies, thereby contaminating it with the blood of a victim. Dr. Boatsman indicated that although his testimony

at the first trial could be interpreted in such a manner, that he had never inserted the blade of the second knife into the body of any victim, always using probes designed for such work. Tr. Vol. VI, p. 1748-49.

Agent Richard Goss of the Oklahoma State Bureau of Investigation testified at trial that Dr. Boatsman had a question about the knife during the autopsy, and that Agent Bentz produced the knife that was retrieved from the bank. Tr. Vol. VI, p. 1707. "Mr Bentz removed the knife . . . held it across the room, just removed it from the envelope and held it up. Dr. Boatsman looked at the knife and drew a conclusion from whatever he saw and Mr. Bentz replaced the knife back in the envelope and removed it from the room." Tr, Vol. VI, p. 1707. According to Agent Goss' testimony, only Agent Bentz handled the knife during the autopsy. Tr. Vol. VI, p. 1708. Petitioner's allegation that Dr. Boatsman inserted the knife into Ms. Bruno's body is not supported by the condition of the knife, because there is no testimony by any witness that there was any blood on the blade. All of the testimony indicates that there was blood on the handle of the knife, which was consistent with its condition when first found at the Bank. This evidence considered in its entirety supports the Oklahoma Court of Criminal Appeals' conclusion that the State established that the knife was in substantially the same condition at trial as when recovered at the bank. Petitioner has not presented any evidence to rebut the State's findings and the undersigned is unable to conclude that Petitioner was prejudiced by introduction of a knife in substantially the same condition as when it was found.

As for the testimony of Dr. Boatsman and its alleged inconsistences from the first trial, the jury was provided with an opportunity to view Dr. Boatsman and with the information regarding his prior testimony and his explanation thereof. Charged with assessing credibility, the jury apparently chose to believe Dr. Boatsman's testimony that he did not utilize a knife to probe the wound, but rather used a probe intended for that purpose as he has done in the past. Tr. Vol. VI, p. 1753-54. Because Petitioner has failed to establish that introduction of the knife found at the scene of the robbery and murders rendered his trial fundamentally unfair so as to result in the denial of due process, the undersigned recommends that habeas corpus relief be denied on Ground Seven.

H. GROUND EIGHT

In Ground Eight, Petitioner argues that prosecutorial misconduct and an inconsistent position taken by the prosecutor at his trial relative to a position adopted by the State at Mr. Neill's trial violated his due process rights. Petition, p. 58. Specifically Petitioner contends that the prosecutor used the same sketch in each trial, representing that it was a composite sketch of the person currently facing charges, when clearly the picture more closely resembled Mr. Neill. Petitioner also complains that the prosecutor removed a photograph of Mr. Neill that had been attached to the sketch prior to introducing the sketch in Petitioner's trial.

On direct appeal, the Oklahoma Court of Criminal Appeals' discussion included the following:

> The record shows that Bellen Robles testified she had given investigators a description of the person she saw inside the Bank and based upon that description a composite drawing was made.

> Arnold Bentz. . . testified he took the information from Mrs. Robles and drew the composite sketch. The prosecutor moved to introduce the composite drawing as State's Exhibit No. 39. Defense counsel objected, arguing that when the exhibit was shown to the witness, a photograph of Neill was attached to the corner. However, the prosecutor had just removed the photograph and therefore improperly modified the exhibit. The trial court inquired of defense counsel whether he had any knowledge that the witness had placed the photograph on the drawing or whether he in any way caused the exhibit to be in that condition. Defense counsel responded in the negative, and the trial court overruled the objection.

Opinion, p. 32. The Oklahoma Court of Criminal Appeals then concluded that Petitioner failed to establish that the drawing was used in an inconsistent manner in Mr. Neill's trial. Opinion, p. 33. The Court further noted that the record was silent as to who attached the photograph of Mr. Neill to the composite drawing. Opinion, p. 33:

> What the record does show is that the prosecutor argued that the composite drawing could resemble either [Petitioner] or Neill. Any inconsistency in this argument was cleared up by Bellen Robles (sic) testimony that she identified Neill as the person she saw in the Bank, and that she identified Neill as the person in the composite drawing. Any error in the prosecutor's argument did not influence the verdict, when considered in light of the evidence against [Petitioner].

Opinion, p. 33 (citation omitted). "[N]ot every trial error or infirmity which might call for application of

supervisory powers correspondingly constitutes a failure to observe that fundamental fairness essential to the very concept of justice." *Donnelly*, 416 U.S. at 642 (internal quotation marks omitted). As noted above, Petitioner is entitled to relief only if the prosecutor's conduct rendered his trial fundamentally unfair in light of the totality of the case.

In support of this contention Petitioner relies on cases that are factually distinguishable. In *Miller v. Pate*, 386 U.S. 1 (1967), the state prisoner was granted habeas corpus relief when the crucial physical evidence, shorts allegedly stained with blood, were proven to be stained with paint. Id. at 5. It was further established that the prosecutor knew at the time of the petitioner's trial the stains were paint not blood, but he nevertheless permitted a chemist to offer false testimony that the blood on the shorts matched the victim's blood-type. *Id.* at 6. Because the prosecution's entire case depended on the prosecution's misrepresentation, the Supreme Court concluded that the petitioner was entitled to habeas corpus relief.

In *United States v. Bakshinian*, 65 F.Supp.2d 1104 (C.D.Cal. 1999), the defendant filed a motion in limine to preclude the government from making an argument inconsistent with the position it had taken at a prior trial of an alleged co-conspirator, where the government argued that Mr. Bakshinian was used by his alleged co- conspirator. *Id.* at 1105. In Petitioner's case, however, the photograph was not used in Mr. Neill's trial to exclude Petitioner as a perpetrator. The State never argued that Mr. Neill acted alone with regard to the robbery and murders. Accordingly, *Bakshinian* does not provide a basis for habeas corpus relief.

Petitioner also relies on *United States v. Kattar*, 840 F.2d 118, 127-28 (1st Cir. 1988). The Court in *Kattar* criticized the government for arguing in Kattar's prosecution that the Church of Scientology was a virtuous organization, when in fact the government had previously alleged illegal conduct by the church. Nevertheless, the Court did not find constitutional error. None of these cases provides Petitioner with a basis for habeas corpus relief.

In this case, the prosecution never waivered in its theory that Mr. Neill and Petitioner committed the crimes together. The prosecutor argued consistently throughout the trial, despite Bellen Robles' testimony, that the sketch could be Petitioner or Mr. Neill.[8] Tr. Vol. VII, p. 1948-52, Vol. VIII, p. 2230-31, 2366-67. Petitioner was cross-examined by the State regarding his appearance at the time of the robbery, admitting that like the sketch, he had straight hair while Mr. Neill had some curl, and that they had similarly-colored blond hair in December 1984. Tr. Vol. VII, p. 1947-51. In fact, Petitioner seemed to agree with the prosecutor that the sketch more closely fit him than Mr. Neill as to height, weight, approximate age, color of hair and length of hair but more closely fit Mr. Neill as far as the glasses were concerned. Tr. Vol VII, p. 1949-52. Petitioner has not established that there was any misrepresentation by the State that would constitute prosecutorial misconduct. Furthermore, to the extent Petitioner is arguing that he was prejudiced because the jury was not permitted to view the sketch with the attached photograph, his claim fails because he presented that exhibit to the jury. Tr. Vol. VIII, p. 2230. When

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[8] Bellen Robles assisted in the creation of the sketch and identified Mr. Neill as the person who shot her in the bank.

Petitioner identified the exhibit he noted that it had a photograph of Mr. Neill attached thereto, and he testified the prosecutor removed the photograph during the trial. Tr. Vol. VIII, p. 2230. This exhibit was introduced without objection from the State. Tr. Vol. VIII, p. 2230-31. The jurors had the benefit of seeing both versions of the sketch, thereby reducing any negative impact that the State's version may have created. Finally, the conviction in this case was not dependent on the State's introduction of the sketch, either with or without the photograph, and the prosecutor's actions did not render the trial fundamentally unfair. Petitioner has not established that the decision of the Oklahoma Court of Criminal Appeals was contrary to or an unreasonable application of clearly established Supreme Court law or that the Oklahoma Court of Criminal Appeals' factual conclusions were unreasonable in light of the evidence presented. Accordingly, the undersigned recommends that habeas corpus relief be denied on Ground Eight.

I. GROUND NINE

In Ground Nine, Petitioner contends that he was deprived of due process by various instances of prosecutorial misconduct. The Oklahoma Court of Criminal Appeals denied relief with regard to each of his claims as will be set forth more specifically herein, except for the Petitioner's claim regarding the time trials, which was not addressed by the Oklahoma Court of Criminal Appeals.

1. Herman Williams' Testimony

The prosecutor introduced the testimony of a convicted felon, who testified that Petitioner had confessed to him while both men were held in the

Comanche County Jail in August 1988. Following an in camera hearing on the admissibility of Herman Williams' testimony, the trial court concluded that it was admissible, with the jury to determine the weight of the evidence and its credibility. Tr. Vol. VI, p. 1619-1633.

In addressing this issue, the Oklahoma Court of Criminal Appeals concluded that Petitioner failed to establish that the State knowingly used false testimony. Opinion, p. 38. The Oklahoma Court of Criminal Appeals further noted that Mr. Williams' criminal history was introduced to the jury and was the subject of intense cross-examination by Petitioner's counsel. Therefore, the Oklahoma Court of Criminal Appeals denied relief. Opinion, p. 38. Petitioner contends this decision was incorrect because Mr. Williams' testimony was incredible on its face and Mr. Williams was clearly seeking assistance from the prosecutor in future parole proceedings. Petitioner further contends that Mr. Williams' testimony was necessarily false, because on re-direct, Mr. Williams testified as follows:

> There was one item he was telling me about supposedly some evidence from him about an FBI agent and he had some paperwork there and he showed me a copy of what—that he had ascertained supposedly to prove that this FBI agent had withheld evidence.

Tr. Vol. VI, p. 1672. According to Petitioner, this testimony is in reference to a Freedom of Information Act request that Petitioner filed, which was not filed until the fall of 1989, one year after Mr. Williams' alleged conversation with Petitioner.

The prosecution may not deliberately deceive the court or jury by presenting false testimony. *See Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Petitioner bears the burden of proving that the prosecutor knowingly presented false testimony. *See Smith v. Gibson*, 197 F.3d 454, 460 (10th Cir.1999). Before perjured testimony can provide grounds for the vacation of a conviction, the petitioner must establish that the testimony was false, that it was material, and that it was knowingly and intentionally used by the government to obtain a conviction. *McBride v. United States*, 446 F.2d 229, 232 (10th Cir. 1971). While the prosecutor knew that Mr. Williams had been convicted of suborning perjury and conspiracy to commit perjury in the past, there is no evidence that he knew that Mr. Williams testified falsely in Petitioner's case, or that Mr. Williams actually did testify falsely. Petitioner simply alleges that Mr. Williams' testimony was necessarily false because there were bases for challenging his veracity.

Contrary to Petitioner's assertion, Mr. Williams' testimony at. Volume VI, page 1672 does not establish that the prosecutor knowingly used perjured testimony. The testimony itself does not provide any basis for identifying the documents referenced by Mr. Williams as emanating from Petitioner's 1989 Freedom of Information Act request, nor did Petitioner seek an evidentiary hearing before the state courts. There is insufficient evidence to conclude that Mr. Williams' testimony was perjury or that the prosecution knowingly used perjured testimony based on Mr. Williams' trial testimony. Petitioner has failed to establish that the Oklahoma Court of Criminal Appeals' decision in this regard was contrary to or an unreasonable application of federal law, and accord-

ingly, Petitioner is not entitled to habeas corpus relief.

The undersigned also notes that Petitioner's reliance on *Ortega v. Duncan* 333 F.3d 102 (2nd Cir. 2003), is misplaced. Therein, the serial perjurer had recanted the testimony he had given at the petitioner's trial. No such recantation has been produced in this case, nor is there any evidence that the prosecutor knew the testimony given by Mr. Williams was false, his history of suborning perjury notwithstanding. The issues raised by Petitioner, including Mr. Williams' prior convictions for suborning perjury and for conspiracy to commit perjury go to the weight and credibility of his testimony. Mr. Williams' criminal record, including his prior convictions for suborning perjury and for conspiracy to commit perjury and the assistance he had received from the State were before the jurors for *their* consideration in assessing his credibility. Tr. Vol. VI, p. 1643-45, 1650, 1658-59, 1664-67, 1674. Petitioner was permitted to establish that the same prosecutor in his case had obtained convictions against Mr. Williams for conspiracy to commit perjury and suborning perjury. Tr. Vol. VI, p. 1666-67. None of this information, however establishes perjury in this case, and Petitioner's unsupported assertion that Mr. Williams was induced to offer false testimony in exchange for support in obtaining parole does not entitle him to habeas corpus relief. The undersigned recommends that habeas corpus relief be denied on this claim.

2. Mathematically Impossible Time Trials

Petitioner argues that the prosecutor deprived him of a fair trial by introducing mathematically impossible time trials. Respondent contends that this issue was not exhausted by Petitioner. The argument

concerning time trials was presented as what appears to be an afterthought in Petitioner's direct appeal brief: The entire argument is set forth herein:

> For the same reasons, the prosecution's introduction of the mathematically impossible time trials was improper and deprived Mr. Johnson of a fair trial and due process. The case should be reversed on this ground as well.

Direct Appeal Brief, p. 44. Petitioner addressed the issue in his reply brief on direct appeal by noting that the "state also does not dispute that, in an effort to discredit Mr. Johnson's alibi, the prosecution offered evidence of time trials that were mathematically impossible." Reply, p. 10. The decision by the. Oklahoma Court of Criminal Appeals in Petitioner's direct appeal does not address the issue in any manner, leading to Respondent's argument that the claim is not exhausted as required by 28 U.S.C. § 2254(b)(1)(A).

In this circuit, a habeas petitioner satisfies the exhaustion requirement by showing either (1) "that a state appellate court has had the opportunity to rule on the same claim presented in federal court," or (2) "that at the time he filed his federal petition, he had no available state avenue of redress." *Miranda v. Cooper*, 967 F.2d 392, 398 (10th Cir. 1992). The exhaustion requirement is satisfied "once [a] federal claim has been *fairly presented* to the state courts." *Castille v. Peoples*, 489 U.S. 346, 351 (1989) (emphasis in original) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)).

The lack of factual and legal development in Petitioner's direct appeal brief to the Oklahoma Court of Criminal Appeals leads to the conclusion that

Petitioner has not exhausted this claim. In *Picard*, the Supreme Court held "that, for purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996). Petitioner's two sentences in his opening brief on direct appeal were insufficient to squarely present the claim to the Oklahoma Court of Criminal Appeals, especially in the absence of any factual development or citation to federal authorities. Accordingly, the undersigned concludes that this claim was not exhausted. The impact of Petitioner's failure to exhaust this claim is irrelevant, because he is not entitled to relief on the merits of the claim. 28 U.S.C. § 2254(b)(2).

The State's theory was that Petitioner was actually present at the bank during the robbery and murders. As noted, Ms. Ward, one of Petitioner's neighbors, placed him at the apartment complex on the day of the robbery and murders, sometime around 1:00 p.m., maybe a few minutes before or a few minutes afterwards. The State attempted to show through various witnesses that Petitioner had time to travel to the bank and commit the robbery and murders, which occurred between 1:15 p.m. and 1:30 p.m. For example, one witness for the State testified that she lived near the apartment complex in which the Petitioner lived and she drove to the bank twice a day since April 1983, and it took her anywhere from 10 to 20 minutes to make the drive, depending on how fast she drove. Tr. Vol. IV, p. 1049-50. An FBI agent testified that he drove the route from the apartment complex to the bank several times, with his fastest time being 18 minutes and 52 seconds and his

slowest time being 23 minutes, observing speed limits and traffic signs. Tr. Vol. VI, p. 1545.

To counter this testimony, Petitioner offered the testimony of an assistant professor of mathematics from Cameron University to testify that based strictly on mathematical computations, it would not be possible for a person to drive from Petitioner's apartment complex to the bank in the time testified to by the State's witnesses. Tr. Vol. VII, p. 1781-1800. In addition, a video producer and a private investigator testified to time trials they ran, driving from the apartment complex to the bank. Tr. Vol. VII, p. 1819-24, 1832-42.

The jury was instructed that its task was to weigh the credibility of the witnesses in assessing Petitioner's guilt. Instruction No. 3, Original Record, p. 2905-07. Both sides presented their evidence as to how long it would take to drive from the apartment complex to the bank, and the jurors were free to weigh the conflicting testimony in determining whether any of the time trials were reliable.

Furthermore, the dispute over the amount of time it took to drive the route was really fairly insignificant, when considered in the context of all of the testimony. For example, the two witnesses who placed Petitioner at the apartment complex prior to the bank robbery/murders estimated that Petitioner was last seen by them at approximately 12:50 - 12:55 p.m. to as late as one to two minutes after 1:00 p.m., a difference of as much as twelve minutes. Tr. Vol. V, p. 1203, 1210, 1427, 1435, 1438. The exact time of the bank robbery/murders was not established, but the robbery/murders were estimated to have occurred around 1:15 to 1:30 p.m. The above times were all estimates and certainly the witness' clocks/watches

could have been off several minutes. The State's evidence as to time trials was almost 19 minutes, while Petitioner's witnesses testified that their time trials were around 20 minutes, a difference of only about one minute. Tr. Vol VI, p. 1545; Tr. Vol VII, p. 1824, 1837-41.[9] Petitioner has not established either that the trials were impossible or that the prosecutor knew they were impossible. Finally, as noted above, Petitioner's presence at the bank during the robbery and murders was not necessary to support a finding of guilt in light of the substantial evidence of his participation in the planning of the robbery and the procurement of the weapons. Accordingly, the undersigned recommends that habeas corpus relief be denied on this claim.

3. Marilyn Roach's Testimony

Petitioner also argues that his due process rights were violated by the testimony of Marilyn Roach, who was injured during the robbery when she was shot in the head. Ms. Roach testified that she heard the voices of two robbers. Tr. Vol. V, p. 1356. Specifically, the following questions were asked and answers given on direct examination:

> Q: After the shooting stopped did you hear anything:
>
> A: Yes.
>
> Q: What, if anything, did you hear?
>
> A: Someone said I thought I told you not to shoot anybody. He was very upset. And he answered—says well they moved. So—.

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[9] Some of Petitioner's time trials took longer and some took less than 20 minutes.

Q: Was there two different voices?
A: Yes.

Tr. Vol. V, p. 1355-56. On cross-examination, the following exchange took place:

> Q: Ms. Roach, except for the conversation that you say you heard that took place behind you as you lay there on the floor in that room there was nothing else that led you to believe there was more than one robber in that bank was there?
> A: Yes, because when I was praying laying there seeking the lord he spoke to me and said forgive them for—forgive them. They need the same grace and blessing that you receive and I remember why the spirit of the lord said forgive them.

Tr. Vol. V, p. 1362-63.

Petitioner contends that because the untrustworthiness of the testimony is obvious and because no other person in the bank heard the conversation, the conclusion contained in a report by an agent of the Federal Bureau of Investigation that Ms. Roach was hallucinating was the only explanation. Petitioner argues that because the testimony was clearly the result of hallucination, that the trial court should not have permitted Ms. Roach to testify.[10]

The Oklahoma Court of Criminal Appeals considered Petitioner's argument and concluded:

> Appellant fails to cite any legal authority to support his allegations. Absent plain error we will not address assertions unsupported by legal

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[10] The report of the agent was apparently included in the original record but not introduced at trial. Opinion, p. 39.

authority. *Romano v. State*, 909 P.2d 92, 117 (Okla Cr. 1995), *cert. denied*, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996).

> Every person is competent to be a witness except as otherwise provided in the Oklahoma Evidence Code. 12 O.S. 1981, § 2601. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. 12 O.S. 1981, § 2602. Evidence to prove personal knowledge may consist of the witness's own testimony. *Id.*

Opinion, p. 39-40. The Court continued by concluding that Ms. Roach had personal knowledge and that the "weight and credibility of her testimony was exclusively for the jury's determination." *Id.* at 40. Finding no plain error in the admission of the testimony, the Oklahoma Court of Criminal Appeals denied relief.

Again, the arguments by Petitioner go to the weight and credibility of Ms. Roach's testimony, not to its admissibility. Pursuant to Oklahoma law, Ms. Roach's statements were fully admissible, and this Court is not free to reconsider the Oklahoma Court of Criminal Appeals' decision with regard to Oklahoma law. Additionally, although Petitioner argues that Ms. Roach's testimony was patently incredible, he presents no evidence other than his speculation that her testimony was false and that the prosecution knew the testimony to be false. Ms. Roach consistently maintained that she heard two voices, even when she was being removed from the bank on a stretcher. Dr. Ingalls, who treated Ms. Roach at the hospital, testified that she was alert and responsive, and that her hearing and memory would have been

intact despite her injury. Tr. Vol. VI, p. 1760-62, 1765. Defense counsel was free to argue that Ms. Roach's testimony was the result of a hallucination and to support this argument with the fact that none of the other survivors heard the conversation. Additionally, if the testimony was as absurd as Petitioner paints it to have been, surely the jury would not have attached significant weight to the testimony. However, because Ms. Roach was a competent witness the issue of her credibility was for the jury, and Petitioner is not entitled to habeas corpus relief. Finally, as noted throughout, Petitioner's conviction did not require his physical presence at the bank during the robbery. Accordingly, the undersigned recommends that habeas corpus relief be denied on this claim.

For the reasons set forth above, the undersigned recommends that habeas corpus relief be denied on Petitioner's Ground Nine.

J. GROUND TEN

In Ground Ten, Petitioner argues that one-sided indefensible evidentiary rulings deprived him of a fair trial. In this section he specifically objects to four rulings by the trial court, each of which is subject to evaluation under the same fundamental fairness standard, set forth above at Ground Seven.

State court rulings on evidentiary matters are issues of state law, which generally may not be challenged on habeas corpus. *See Martin v. Kaiser*, 907 F.2d 931, 934 (10th Cir. 1990) (error in admission of evidence is generally a matter of state law not cognizable on habeas corpus). Rather, "[s]tate court rulings on the admissibility of evidence may not be questioned in federal habeas proceedings unless they

render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights." *Brinlee v. Crisp*, 608 F.2d 839, 850 (10th Cir. 1979) (citing *Gillihan v. Rodriguez*, 551 F.2d 1182, 1192-93 (10th Cir. 1980)).

1. Post-Robbery Cocaine Usage

Petitioner argues that the evidence that he and Mr. Neill used cocaine in the days between the robbery and their apprehension denied him a fair trial. Petitioner raised this issue on direct appeal and the Oklahoma Court of Criminal Appeals concluded:

> This identical issue was raised by Neill in his direct appeal. In rejecting Neill's claim of error, this Court found the evidence properly admitted as "evidence of the events occurring in San Francisco were so closely related to the bank robbery and murders that they formed a logical connection with the charged offenses so as to be relevant evidence." 896 P.2d at 551.

Opinion, p. 26. The Oklahoma Court of Criminal Appeals noted that both Petitioner and Neill received notice of the State's intention to use this Rule 404(b)-type evidence, and concluded that the cocaine usage was indicative of how the proceeds of the robbery were utilized. Opinion, p. 27. In addition, the Court noted that the jury was instructed as to the limited use of the evidence. *Id.*

Petitioner has failed to establish that the introduction of the evidence regarding his cocaine usage in San Francisco rendered his trial fundamentally unfair. The jury in Petitioner's case was instructed on how the evidence should be used, and the jury is

presumed to have followed these instructions.[11] *Weeks v. Anselone*, 528 U.S. 225, 234 (2000). Furthermore, "[e]vidence introduced by the prosecution will often raise more than one inference, some permissible, some not; we must rely on the jury to sort them out in light of the court's instructions." *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir.1991). Only if there were no permissible inferences that the jury could draw from the evidence would its admission have violated Petitioner's due process rights. *Id.* Because there was a permissible inference, Petitioner's motive for the robbery, his knowledge thereof, and tracing the proceeds from the robbery, Petitioner's due process rights were not violated by introduction of his post-robbery drug usage and habeas corpus relief should be denied on this claim.

2. Letters to Paul Dunn

Petitioner also argues that he was denied a fair trial by admission of statements he made in letters to Dr. Paul Dunn, a man who contacted Petitioner in prison and told him that he wanted to write a book about the murders. Petitioner was subject to cross-

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[11] As noted by the Oklahoma Court of Criminal Appeals, Instruction No. 34 to the jury provided:

> Evidence has been received that the defendant has allegedly committed offenses other than that charged in the information. You may not consider this evidence as proof of the guilt or innocence of the defendant of the specific offense charged in the information. This evidence has been received solely on the issue of the defendant's alleged motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. This evidence is to be considered by you only for the limited purpose for which it was received.

(O.R. 2940), Opinion, p. 27, n. 5.

examination regarding the letters by the State. Petitioner contends that the statements he made in the letters were inflammatory, prejudicial, and not even arguably probative of any legitimate issue in the case. Petition, p. 71.

On direct appeal, the Oklahoma Court of Criminal Appeals held as follows:

> [Petitioner's] defense was that he did not participate in the robbery/homicides and was unaware of Neill's plans to rob the Bank. [Petitioner] also testified that he had a "horrible" childhood, that he was abused by his stepfather, and that he watched his stepfather abuse his mother, which resulted in his passive nature.
>
> To rebut that defense, the prosecutor introduced statements [Petitioner] had made in his letters to Mr. Dunn. In these letters, [Petitioner] attempted to elicit money for his accounting of the robbery/homicides. [Petitioner] said in part, "I know I have a good story and I know it will make a great book/movie. I'm just waiting for a reasonable financial opportunity. I feel it's only fair, I'm eager and ready."

Opinion, p. 28-29. The Court concluded that Petitioner was not deprived of a fair trial because the questions he was called upon to answer on cross-examination tended to elucidate, modify, explain, contradict, or rebut Petitioner's direct testimony.

At trial Petitioner testified on direct that he had a very unhappy childhood and counsel argued that as a result of an abusive childhood Petitioner was subject to being controlled by Mr. Neill. Petitioner's letters to Paul Dunn were fully admissible to discredit Peti-

tioner's testimony, because in those letters Petitioner told Paul Dunn that his childhood was happy.[12]

Additionally, Petitioner's statements to Paul Dunn that he had a good story to tell and his desire to receive financial compensation for his story were probative of his credibility and his role in the robberies. Although Petitioner was aware that he could not personally profit, he made arrangements for the money to go to his mother. Tr. Vol. VII, p. 1960.

Petitioner complains about the decision to allow the State to introduce a portion of a letter where he referred to Oklahomans as hicks. This was allegedly made to school counselors, when Petitioner sought help because people were calling him names. Tr. Vol. VII, p. 1973. Although he sought help for this issue, Petitioner never once mentioned the alleged abuse by his step-father to the counselor, again calling his credibility into question. Finally, the letters included an attempt by Petitioner to place the blame on Ruben Robles, one of the victims, by attributing the conversation overheard by Marilyn Roach to Mr. Neill and Mr. Robles. Tr. Vol. VIII, p. 2184-88. Petitioner testified at trial that any lies he included in his letters were statements made by Mr. Neill and passed to Petitioner by Petitioner's mother. Tr. Vol. VIII, p. 2184-86.

Petitioner has not established that his admissions in his letters to Paul Dunn were prejudicial in light of his testimony or that the content of the letters was an improper subject for cross-examination. Certain letters show an attempt to place the blame on Mr.

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[12] In a letter to Paul Dunn, Petitioner wrote, "I really enjoyed growing up. I loved school. I always looked forward to Mondays. I guess I enjoyed learning." Tr. Vol. VII, p. 1971.

Robles, a victim of the robbery. The prosecution was entitled to utilize Petitioner's admissions to challenge the credibility of his testimony. Furthermore, Petitioner was not precluded from showing that despite the potentially incriminating statements in his letters to Mr. Dunn that he maintained his innocence in the letters and that he did in fact complain about how his stepfather treated him. The issue of Petitioner's credibility was fairly presented to the jury. Because Petitioner has failed to establish that the letters rendered his trial fundamentally unfair, he is not entitled to habeas corpus relief on this claim.

3. Crime Scene Photographs

Petitioner argues that he was deprived a fair trial by the admission of twenty-eight photographs of the victims and the crime scene. Petition, p. 74. Petitioner does not argue that the Oklahoma Court of Criminal Appeals' decision regarding the photographs was contrary to or an unreasonable application of clearly established federal law as enunciated by the Supreme Court, arguing instead that pursuant to Oklahoma case law admission of the photographs was error.

On habeas review, this Court considers only "whether the admission of the photographs rendered the proceedings fundamentally unfair." *Smallwood*, 191 F.3d at 1275. The fundamental fairness analysis is approached with "considerable self-restraint." *Id.* Although the photographs are graphic in that they depict the victims of the robbery prior to the start of the autopsy, those photos are not so repetitious as to be prejudicial. The pictures depict the size and location of the stab wounds. The photographs of victims in the bank depict the location of the bodies and are not gruesome in the legal sense. The victims'

wounds are not readily identifiable in those photographs. The undersigned finds that the admission of the challenged photographs did not render Petitioner's trial fundamentally unfair. Therefore, the Oklahoma Court of Criminal Appeals' rejection of this claim was not unreasonable, and the undersigned recommends that habeas relief be denied

4. Petitioner's Expert Witness

Petitioner argues the trial court violated his right to a fair trial when it refused to permit his expert witness to testify whether it would have been possible to drive a four- cylinder car from Petitioner's apartment to the bank in seventeen minutes or less. Petition, p. 75. At trial Petitioner had Dub Armstrong, a private investigator and former police chief in El Reno, Oklahoma, testify about the time it took him to drive the route from the apartment complex to the bank. Petitioner's counsel then asked Mr. Armstrong:

> Chief Armstrong, based on your experience in law enforcement, based solely on your experience, could an automobile that has only four cylinders and 82 horsepower, would an automobile of that horsepower get from the Tanglewood Apartments to the Geronimo bank site in seventeen minutes or less?

Tr. Vol. VII, p. 1850. The State objected, and the Court sustained the objection. Tr. Vol. III, p. 1850. Because the Court would not allow the opinion, Petitioner's counsel proffered that Mr. Armstrong would, if permitted, testify that it would not have been possible to drive the route in a four cylinder 82 horsepower car in 17 minutes and 18 seconds. Tr. Vol. VIII, p. 1851. In considering this claim, the

Oklahoma Court of Criminal Appeals noted that Mr. Armstrong had conducted time trials between the apartment where Petitioner and Mr. Neill lived and the bank, driving three different routes three or four times each. Opinion, p. 21. The Court concluded that Mr. Armstrong was not properly qualified as an expert under Oklahoma law. Opinion, p. 23.

> His experience in law enforcement was not sufficient to qualify him to render an expert opinion on whether a certain type of car could drive a particular route in a specified amount of time. No evidence of facts or data of a type reasonably relied upon by experts in the field of accident reconstruction was offered. Armstrong's experience in driving the routes several times was sufficient to support his personal opinion, but insufficient to support an opinion as an expert.

Opinion, p. 23.

The right of a criminal defendant to offer testimony is grounded in the Sixth Amendment. *Taylor v. Illinois*, 484 U.S. 400, 408-409 (1988). Defendants generally have the right to present "competent, reliable . . . evidence." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). However, this right to present evidence "is not unlimited, but rather, is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998). A defendant's interest in presenting such evidence may "bow to accommodate other legitimate interests in the criminal trial process." *Rock v. Arkansas*, 483 U.S. 44, 55 (1987). Additionally, in presenting testimony a criminal defendant must comply with established rules of evidence and procedure as required by the state "to assure both fairness and reliability in the ascertainment of guilt and inno-

cence." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). As a result, state and federal rule makers have a broad latitude under the Constitution to establish rules excluding evidence from criminal trials. *Scheffer*, 523 U.S. at 308.

In *Morris v. Burnett*, 319 F.3d 1254 (10th Cir. 2003), the Tenth Circuit considered the Supreme Court decision in *Scheffer*. The Tenth Circuit noted that the Supreme Court concluded in *Scheffer* that the exclusion of polygraph evidence did not violate the petitioner's Sixth Amendment rights because exclusion of the evidence did "not implicate any significant interest of the accused." *Id.* at 1275 (quoting *Scheffer*, 523 U.S. at 316-17). Secondly, the reliability of the evidence was questionable. *Id.* at 1275 (citing *Scheffer*, 523 U.S. at 309-12).

At first blush it would appear that Petitioner had "significant interest" in the excluded testimony. However, "Mlle discussion in *Scheffer* . . . indicates that the 'significant interest' of concern is the right to put on factual evidence." *Id.* at 1275. Petitioner was not precluded from offering evidence as to how long it took for his witnesses to drive from the apartment complex to the bank. As noted above, Mr. Armstrong was allowed to testify about the time trials that he conducted and about how long it actually took him to drive the routes between the apartment and the bank.[13] Mr. Armstrong was only precluded from

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[13] Petitioner contends that the State was permitted to have a witness testify about the time in which it would have taken a person to drive from Petitioner's apartment to the bank. Petitioner cites to the transcript, Vol. IV, p. 1050, in support of this contention. At that page Marie Cork, a fact witness, was asked how long it took her to get from her apartment across from the complex where Petitioner lived to the bank. Contrary

giving his "expert" opinion because the trial court concluded that he lacked the necessary expertise to support such an opinion. As in *Scheffer*, the reliability of the evidence is in question. Because Petitioner's "significant interest" was not implicated by the Court's exclusion of this particular opinion of Mr. Armstrong, Petitioner is not entitled to habeas corpus relief on this claim.

Petitioner's contention that the limitation violated his due process rights is without merit as well. The decision of the Oklahoma Court of Criminal Appeals that Mr. Armstrong was not qualified as an expert to testify to the opinion was an issue of state law. The limitation imposed on his testimony was by virtue of the limitation on his qualifications, a factual finding entitled to deference. There was no evidence that Mr. Armstrong was qualified to testify about the ability of a particular car to complete the route in the absence of evidence of particularized knowledge about particular-sized engines. The excluded testimony has greater scientific implications in light of counsel's attempt to have him testify about the capacity of a car of a certain engine size. Accordingly, even if construed under the due process clause, Petitioner has not established that his rights were violated. Accordingly, the undersigned recommends that habeas corpus relief be denied on Ground Ten.

K. GROUND ELEVEN

In Ground Eleven, Petitioner argues that he was denied a fair trial and an impartial jury when a juror opposed to conviction was targeted for investigation and removed from the jury during his sentencing

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to Petitioner's assertion, she was not offering an opinion, but rather was testifying regarding a personal experience.

proceedings. Petitioner alleges that Karen Nobis, a juror not favorable to the State's case, was removed from the jury following the deliberations in the guilt phase of his trial and following opening statements and the testimony of two witnesses during the penalty phase of trial. Petition, p. 79.[14]

On direct appeal, the Oklahoma Court of Criminal Appeals considered the case under Oklahoma law, because Petitioner had cited to a single case regarding the confidential nature of jury deliberations. Order, p. 41 (citing *United States v. Olano*, 507 U.S. 725, 737 (1993)). *Olano*, however, dealt with permitting alternate jurors to be present without participating during deliberations and the taint their presence could have on the jury. This, however, was not an issue raised by Petitioner. The Oklahoma Court of Criminal Appeals concluded that the trial judge's decision to exclude the juror based on her *voir dire* responses and her conversation with her mother-in-law was proper under Oklahoma law.

The Oklahoma Court of Criminal Appeals concluded that the removal of the juror clearly did not impact the guilt stage of Petitioner's trial. Opinion, p. 46. The Oklahoma Court of Criminal Appeals further concluded that because Petitioner was not sentenced to death despite the jury's finding of three aggravators, that Petitioner could not establish that he was prejudiced by Ms. Nobis' removal. Opinion, p. 46. The Oklahoma Court of Criminal Appeals also noted

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[14] Petitioner contends in his reply brief that juror Nobis was heard saying during jury deliberations that she would not find Petitioner guilty of first degree murder. Reply Brief, p. 40. Clearly, she did find Petitioner guilty of first degree murder as she was not removed from the jury until the penalty phase of the trial.

from the record that the trial judge concluded that Petitioner's counsel stood outside the jury deliberation room door longer than the prosecutor, leaving Petitioner hard pressed to argue that he is entitled to relief because of the prosecutor's actions. Opinion, p. 47, note 7.

After the jury returned a verdict of guilty against the Petitioner, the prosecutor realized that one of the jurors had paid little attention to the final witnesses or to closing arguments. Tr. Vol. IX, p. 2565. Curious as to why, the prosecutor sought additional information about the juror, Ms. Nobis. Tr. Vol. IX, p. 2565-66. The prosecutor obtained a reading of Ms. Nobis' *voir dire* from the court reporter, which indicated that Ms. Nobis had been represented by Petitioner's original trial counsel as part of an earlier divorce proceeding. Tr. Vol. IX, p. 2568. After reviewing the divorce file, the prosecutor believed that Ms. Nobis had not been forthcoming and had misled the Court with her responses on *voir dire* that the attorney did not get involved in her case. Tr. Vol. IX, p. 2536, 2540, 2568.

The prosecutor received information from Ms. Nobis' mother-in-law, Evelyn Nobis, indicating that contrary to the judge's instructions Ms. Nobis had spoken about the case, commenting on the evidence, and indicating that jurors did not feel that the State had proven that Petitioner was in the bank and stating that he would likely receive a sentence less than death as punishment. Tr. Vol. IX, p. 2552-53, 2555.

Petitioner contends that the prosecutor became concerned only after listening to the confidential jury deliberations from outside the door to the deliberation room. The trial court acknowledged that both

the prosecutor and defense counsel were present at the door, stating:

> Well, I noticed that you did not, Mr. Payne, [one of Petitioner's attorneys] and I can say that I saw Mr. Schulte [the prosecutor] there for a period of time early in deliberations. Mr. Barta [another of Petitioner's attorneys] was there most of the time during deliberations.

Tr. Vol. IX, p. 2583. The Court concluded that Ms. Nobis was subject to removal primarily based on the fact that contrary to her answers during voir dire, Petitioner's prior trial counsel had represented her during the early stages of her divorce proceedings. Tr. Vol. IX, p. 2587-88.

As noted, defense counsel was implicated by the trial judge as being present in the same location for much of the deliberations, and thus it is difficult to discern that Petitioner should benefit from an alleged interference with the jury undertaken by both sides in the case. Furthermore, the record is devoid of any evidence that the prosecution obtained any knowledge by listening at the door of the jury deliberation room or that using this information resulted in interference with the jury that violated Petitioner's constitutional rights. The prosecutor's unchallenged reason for seeking the juror's removal was from information he gained by watching her during the trial and by information he received from her mother-in-law. Finally, Petitioner fails to establish that in light of the facts set forth above, that the Oklahoma Court of Criminal Appeals' decision was contrary to or an unreasonable application of clearly established federal law. This Court does not sit as a super-appellate court to offer direct review of the decisions of the Oklahoma Court of Criminal

Appeals. *See Robinson v. State of Oklahoma*, 404 F.Supp. 1168, 1170 (W.D. Okla. 1975). The scope of habeas corpus review is tightly circumscribed, and Petitioner, being represented by counsel, should provide the Court with arguments based on Supreme Court authority to support habeas corpus relief under the standards set forth herein. In the absence of any such authority, the undersigned concludes that the above cited facts preclude a finding that Petitioner was prejudiced by Ms. Nobis' removal as a juror and recommends that habeas corpus relief be denied on Ground Eleven.

L. GROUND TWELVE

In Ground Twelve, Petitioner argues that he was deprived of his right to a fair trial because the trial court refused to instruct the jury that it could not attribute Mr. Neill's conduct to Petitioner in determining the appropriate sentence. Petition, p 82. In considering this claim on direct appeal, the Oklahoma Court of Criminal Appeals noted that Petitioner's only citation was to *Lockett v. Ohio*, 438 U.S. 586 (1978). The Oklahoma Court of Criminal Appeals concluded that *Lockett* did not apply in cases where the jury chooses a punishment less than death. Opinion, p. 47. The Oklahoma Court of Criminal Appeals further noted that the specific instruction sought by Petitioner applied only to the death penalty because Petitioner specifically requested that the jury be instructed that it could not attribute Mr. Neill's actions to Petitioner in the event they found Mr. Neill's conduct to be heinous, atrocious and cruel, one of the statutory aggravating circumstances for imposition of the death penalty. Opinion, p. 47.

Petitioner contends that *Lockett* necessarily applies in all cases where the death penalty is an option for

the jury. The undersigned disagrees. In *Lockett*, the Supreme Court noted the following:

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in *imposing* the death sentence.

Lockett v. Ohio, 438 U.S. 586,605 (1978)(emphasis added). The Supreme Court's focus in *Lockett* was on the jury's ability to consider mitigating factors. In this case clearly the jury was not precluded from full consideration of the mitigating factors, because the jurors concluded that the mitigating factors outweighed the aggravating factors and imposed a sentence of less than death. A subsequent Supreme Court decision supports this interpretation of the purpose of *Lockett*.

> In *Lockett*[,] . . . Chief Justice BURGER, writing for the plurality, stated the rule that we apply today: "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's

> character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Id. at 604, 98 S.Ct. at 2964 (emphasis in original).

Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). This was so, because death by public authority is "profoundly different from all other penalties.'" *Id.* (quoting *Lockett*, 438 U.S. at 605). Although Petitioner argues that because death was an option for the jury that the judge was required to give his requested instruction, as noted by the Oklahoma Court of Criminal Appeals, the instruction became unnecessary once the jury imposed a lesser sentence. Accordingly, habeas corpus relief should be denied on Ground Twelve.

M. GROUND THIRTEEN

In Ground Thirteen, Petitioner argues that the State's improper closing argument during the penalty phase deprived him of a fair trial. Petition, p. 84. Petitioner complains about the following passage from the prosecutor's second phase closing argument:

> Bring your common sense to this case. Any time you have a death, four. deaths, four additional people shot, of this magnitude, and the individuals for what reason so that can take the money, hit the gay bars, party and do cocaine and go on a shopping spree in San Francisco . . . And I pray that you're strong enough _ _ there is only one verdict _ _ to get up, go in that deliberation room, render your decision, make it unanimous. Those of you that are strong on this jury work on the weak. . . . Counsel wants one of you that is not strong enough to assess the death penalty and if he is able to get that then he saves

> this man's life . . . . I pray you, I beseech you stay strong . . . [H]old your head up high, you follow the law. You were committed to your oath.

Tr. Vol. IX, p. 2777-78. In rejecting his argument on appeal the Oklahoma Court of Criminal Appeals concluded that because Petitioner's counsel had only objected to the reference to the "weak," that all but plain error had been waived. Opinion, p. 48. The Oklahoma Court of Criminal Appeals further concluded that portions of the closing argument were proper because the State is permitted to comment on the evidence, and that it was not error for the prosecutor to emphasize to the jury its duty and to ask them to consider the punishment. Opinion, p. 48. Thus, the Oklahoma Court of Criminal Appeals concluded that the comments were not improper. Opinion, p. 49.

Prosecutorial misconduct does not warrant federal habeas relief unless the conduct complained of "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643; *see also Mahorney v. Wallman*, 917 F.2d 469, 472 (10th Cir.1990). In evaluating whether improper prosecutorial comments render a trial fundamentally unfair, the comments are viewed in the context of the trial as a whole. *Duvall v. Reynolds*, 139 F.3d 768, 794 (10th Cir. 1998) (citation omitted). "[N]ot every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice." *Donnelly*, 416 U.S. at 642 (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)).

The prosecutor's comments were clearly directed at asking the jurors to render a unanimous death

penalty verdict, which did not happen. The prosecutor's argument included the following:

> And don't put that burden on your shoulders when you go back or when that foreman signs that verdict for death. This man has earned it. . . . It's not your fault four people were shot in the Geronimo Bank or that two people went to California and partied until they were caught. No. You're to apply the law to the facts and no other penalty fits. None. Beg you the death penalty. Make sure that all twelve of you so agree. Make sure you check the aggravating circumstances that apply, hold your head up high, you follow the law.

Tr. Vol. IX, p. 2778. In the context of the entire trial, and in light of the jury's decision to render a verdict of life imprisonment without the possibility of parole, the undersigned cannot conclude that the prosecutor's closing argument rendered Petitioner's trial fundamentally unfair. Petitioner has failed to establish that the decision of the Oklahoma Court of Criminal Appeals was contrary to or an unreasonable application of clearly established federal law, and accordingly, the undersigned recommends that habeas corpus relief be denied on Ground Thirteen.

RECOMMENDATION

Having reviewed the record in this case and the parties' filings, the undersigned recommends that the petition for writ of habeas corpus be denied. The parties are advised of their right to file objections to this Report and Recommendation with the Clerk of this Court by April '21, 2006, in accordance with 28 U.S.C. § 636 and Local Civil Rule 72.1. The parties are further advised that failure to timely object to

this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. *Moore v. United States*, 950 F. 2d 656 (10th Cir. 1991). This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 29th day of March, 2006.

/s/ Doyle W. Argo
DOYLE W. ARGO
United States Magistrate Judge

APPENDIX E

NOT FOR PUBLICATION

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

[Filed December 2, 2003]

Case No. F-2002-918

ROBERT GRADY JOHNSON,
Appellant,

v.

STATE OF OKLAHOMA,
Appellee.

OPINION

LUMPKIN, JUDGE:

Appellant Robert Grady Johnson was tried by jury and convicted of four counts of First Degree Murder (Counts I-IV) (21 O.S.1981, § 701.7); three counts of Shooting with Intent to Kill (Counts V-VII) (21 O.S.1981, § 652); and one count of Attempted Shooting with Intent to Kill (Count VIII) (21 O.S.1981, § 652), in Case No. CRF-84-597, in the District Court of Comanche County. The jury recommended as punishment life imprisonment without the possibility of parole on all four murder counts, twenty (20) years imprisonment on the three shooting with intent to kill counts, and ten (10) years imprisonment on the attempted shooting with intent to kill count. The trial court sentenced accordingly, with all counts to run consecutively to the other. It is from this judgment and sentence that Appellant appeals.

The details of the crimes perpetrated by Appellant and his accomplice, Jay Wesley Neill, on December 14, 1984, are set forth in *Neill v. State*, 896 P.2d 537 (Okl.Cr.1994), *cert. denied*, 516 U.S. 1080, 116 S.Ct. 791, 133 L.Ed.2d 740, (1996).[1]

In his first assignment of error, Appellant challenges the sufficiency of the evidence supporting his convictions for felony-murder. Specifically, Appellant contends that to support a conviction for felony-murder, the State must prove the defendant was in the commission of the underlying felony at the time death occurs. Appellant argues the State did not prove beyond a reasonable doubt that he was present

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[1] Appellant and Jay Wesley Neill were tried together and convicted of committing the 1984 murders and shootings at the First Bank of Chattanooga in Geronimo, Oklahoma (hereinafter referred to as the Bank). Both defendants were sentenced to death. On appeal, this Court found the defendants had been prejudiced by their joint trial. This Court reversed the convictions and remanded the cases for separate trials. In July 1993 Appellant was tried a second time and again found guilty of the murders, as well as the four lesser charges. *Johnson v. Champion*, 288 F.3d 1215, 1218 (10th Cir.2001). He was sentenced to life in prison without the possibility of parole. *Id.* In August 1993, Appellant filed a *Notice of Intent to Appeal*. *Id.* However, no appellate brief was filed. On October 19, 1994, Appellant's appeal was dismissed. *Id.* On November 17, 1994, Appellant moved this Court to allow him to file an appeal out to time. *Id.* The Court denied the motion. Id. After exhausting state post-conviction remedies, Appellant filed for a *Writ of Habeas Corpus* in the United States District Court for the Western District of Oklahoma on the basis that his failure to timely file an appellate brief was due to ineffective assistance of counsel. *Id.* The District Court denied relief, but the Tenth Circuit Court of Appeals reversed, granted the writ of habeas corpus and reinstated Appellant's right to appeal. *Id.* Appellant filed his Petition in Error with this Court on October 3, 2002.

in the Bank and participating in the robbery at the time of the victims' deaths.

Appellant's presence in the Bank at the time of the robbery/homicides has been the subject of controversy. The State's evidence showed Appellant participated in the planning and commission of the robbery/homicides. Appellant took the witness stand and denied being in the Bank and participating in the robbery/homicides.

A conviction for felony-murder requires that the accused must have committed murder while in the commission of one of the enumerated felonies found in 21 O.S.Supp.1982, § 701.7(B). All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals and are equally culpable with other principals. 21 0.S.1991, § 172. *See also Conover v. State*, 933 P.2d 904, 910-911 (Old.Cr.1997). Mere presence or acquiescence, without participation, does not constitute a crime. *Id.* However, only slight participation is needed to change a person's status from a mere spectator into an aider and abettor. *Id.* "Aiding and abetting in a crime requires the State to show the accused procured it to be done, or aids, assists, abets, advises or encourages the commission of the crime." *Id. quoting Hindman v. State,* 647 P.2d 456, 458 (Okl.Cr.1982).

As the evidence in this case was both direct and circumstantial, we review the evidence in the light most favorable to the State, and find that a rational trier of fact could have found Appellant guilty of first degree felony-murder. *Spuehler v. State*, 709 P.2d 202, 203-204 (Okl.Cr.1985).

The State's evidence showed that in mid-November 1984, co-defendant Neill, with Appellant standing next to him, told a friend they were going to rob the Bank because it did not have any security cameras or guards.

Prior to December 1984, Appellant told several friends of the severe financial problems he and Neill were experiencing. The week before the crimes, Appellant appeared to his neighbors to be nervous and upset. On Sunday December 9, Appellant and Neill purchased over $900.00 worth of clothes and jewelry. The next night, Appellant and Neill went to dinner at a local restaurant. Neill again mentioned robbing the Bank as a way to solve their financial problems.

On Wednesday, two days before the robbery/ homicides were committed,. Neill visited a local pawnshop and inquired about the purchase of a gun. He indicated to the clerk that he needed the gun for protection as he had received threatening phone calls. Different types of guns were described to him and he was told that he must have a gun permit from the police department in order to purchase a gun. However, at nineteen years old, Neill was too young to apply for the permit.

The next morning, Neill talked with a travel agent at the Lawton Municipal Airport. He originally wanted a flight to Nassau leaving after 6:00 p.m. Friday, December 14th. When told there was not a flight available, he requested one to San Francisco leaving after 5:00 p.m. that Friday. Neill also inquired into hotel accommodations, specifically executive suites and limousine services. When asked for payment, Neill said he would pay in cash on Friday.

That same morning, the twenty-one year old Appellant applied for a gun permit at the Lawton Police Department. He volunteered that he lived alone and needed the gun for protection. He was told he would have to wait twenty- four hours before he could pick up the permit.

At approximately 1:15 p.m. that afternoon, Appellant and Neill walked into the Bank. They stayed only a few minutes, talking only with each other and looking around the Bank. Approximately 45 minutes later, Appellant and Neill purchased two hunting knives at a local discount store. They initially looked at purchasing a gun, but when informed the guns in that store were not real, they both looked at the selection of knives. After discussion among themselves, they selected two knives, each with a six-inch blade. Neill wrote a check for the knives from the checking account he shared with Appellant. Both Neill and Appellant provided identification for the check.

On the day of the robbery/homicides, Friday, December 14, 1984, at approximately 10:00 a.m., Appellant and Neill returned to the pawnshop and asked for a revolver seen on a previous visit. Neil asked what type of ammunition was needed for the gun, and Appellant asked where they could purchase that type of ammunition. Both men were shown how to load and fire the gun, and both men held the gun. They told the clerk they were to get the gun permit by 2:30 p.m. that afternoon and would be back then to purchase the gun.

At approximately 11:30 a.m., December 14, Appellant returned to the police department and picked up the gun permit. At approximately 12:25 p.m., both men returned to the pawnshop to purchase the gun.

They hurriedly filled out the appropriate forms. Instead of listing his apartment as his address, Appellant wrote down a false post office box number. Appellant started to write the check to pay for the gun, but Neill insisted on filling out the check. The gun was handed to Appellant and he and Neill left the store.

Appellant and Neill then went to a local discount store to purchase ammunition. While Neill was asking about ammunition, Appellant went to find masking tape to purchase. Once again, Neill was too young to purchase the ammunition, so he waited for Appellant's return. Within 30 minutes of purchasing the ammunition and leaving the store, Appellant and Neill returned to the store to exchange the shells. The gun they had purchased had been mistakenly marked as a .38 caliber when it was actually a .32 caliber. So, the .38 caliber shells purchased had to be exchanged for .32 caliber shells.

At approximately 12:45 p.m., Appellant went to a neighbor's apartment to use the telephone. He re-scheduled the travel plans for an earlier flight, leaving at approximately 2:30 p.m. that afternoon.

Shortly after 1:00 p.m., Appellant and Neill entered the Bank. Bank employees Kay Bruno, Jerri Bowles and Joyce Mullenix were herded to a back room, forced to lie face down on the floor and stabbed to death. At the front of the Bank, Bellen Robles had entered in order to deposit a check. Finding the teller windows empty, she looked down the hallway to the back room. There she saw the back of a man as he bent over something. She went outside to tell her waiting husband, Reuben, that she thought the Bank was being robbed. He doubted this, and went inside the Bank with his wife and their fourteen (14) month

old daughter. Entering the Bank just behind them was local farmer, Ralph Zeller. Barely inside the front door, they were greeted with a gun pointed at them and told to go to the back room if they wanted to live. Once in the back room they were directed to lie down on the floor.

The Robles and Mr. Zellner were left in the back room while Neill went up to the front of the Bank to sack up the money. While he was doing so, another customer, Marilyn Roach, entered the Bank. Neill pointed the gun at her and forced her to the back room. She was barely able to lie down inside the small, now crowded room. Moments later the gunshots rang out. Ms. Roach was shot twice in the head. Bellen and Ruben Robles were each shot once in the head. Turning his head to keep the blood out of his eyes, Ruben Robles saw the gun pointed at his baby daughter and heard it click. But no shots were fired; the gun was empty.

One of the first people in the bank after the robbery/homicides was Calvin Bowles. As Bowles checked the status of the bodies lying on the floor, Reuben Robles rose up and said they had been shot in the head. His wife, Bellen, then rose up and said to her husband, "I told you they were robbing the bank." Paul Franklin, who was also one of the first people on the scene after the shootings, testified to helping emergency medical personnel carry out Marilyn Roach. Mr. Franklin testified Ms. Roach asked, "Are they gone?"

Marilyn Roach later told investigators that after the shooting stopped, she heard two distinct voices in the bank. One voice, which sounded, "upset" said, "I told you not to shoot anybody." The other voice, which sounded "casual", responded, "well, they moved."

At approximately 2:00 p.m., that day, Dara Pope arrived at her apartment across the hall from the apartment shared by Appellant and Neill. She knocked on Appellant's door but no one responded.

Appellant and Neill arrived at the Lawton Airport at approximately 2:30 p.m. They paid one thousand two hundred dollars ($1,200.00) in cash for their tickets and boarded the plane; carrying only a tote bag. After arriving in San Francisco, Appellant and Neill embarked on a spending spree, traveling by limousine to various clubs and stores. They were arrested in their San Francisco hotel, Monday, December 17, 1984.

That same day, Appellant was interviewed by Federal Bureau of Investigation (FBI) Agent Dave Knowlton. In response to the agent's questions, Appellant said Neill had told him on December 13 of his plan to rob the Bank, and that Neill asked Appellant's help in obtaining a gun. Appellant said he did help Neill acquire the gun and that after the robbery, he threw the gun in a pond. Appellant also told Agent Knowlton that Neill had a hunting knife with him when he left the apartment to go to the Bank.

Sometime after December 14, 1984, the apartment shared by Appellant and Neill was cleaned by the apartment complex's maintenance man. The scabbards belonging to the knives Appellant and Neill had purchased were found hidden behind sheetrock up close to the ceiling in the hall closet where the furnace was located.

This evidence showed Appellant fully participated in the planning and execution of the robbery/homicides. Although Appellant was not identified by

any witnesses as being inside the Bank with Neill, his conduct leading up to the robbery/homicides, and his conduct after the crimes, creates a reasonable inference that his was the other voice heard by Marilyn Roach inside the bank. This evidence is sufficient to find Appellant guilty as a principal to felony- murder.

Appellant argues the aider and abettor rule cannot be aggregated with the felony-murder rule to allow a conviction for felony-murder when the defendant was not present during the commission of the underlying felony. In support of his argument, Appellant relies on *Anderson v. State*, 66 Okla.Crim.291, 91 P.2d 794 (1939). In *Anderson*, the defendant and codefendant Goff went to a dance where approximately two hundred people were in attendance. Goff got into an argument with a man at the dance, drew a gun from his overalls, struck the man over the head, and fired the gun indiscriminately into the crowd, killing three innocent bystanders. Anderson was charged with murder but found guilty of manslaughter for the shooting. In addressing Anderson's challenge to the sufficiency of the evidence, this Court discussed the aider and abettor rule and found the evidence insufficient to support Anderson's conviction as a principal. This Court stated:

> There is no proof of a conspiracy or prearranged plan between the defendant and his codefendant Goff, to murder, kill or even do bodily harm to any person. No word spoken at the time of the actual shooting, and no participation by the defendant in any way to aid, abet or even to assist the said Goff in his action.

91 P.2d at 799.

This holding shows the aider and abettor rule was not applicable in *Anderson* under the particular facts of the case. This Court did not state that the aider and abettor rule could never be applied to felony-murder. *See Truner v. State*, 477 P.2d 76, 84 (Okl. Cr.1970) (aider and abetter rule not applicable based on particular facts of case showing there was no proof of a conspiracy or pre-arranged plan between defendant and either of the co-defendants to murder, or kill, or even do bodily harm to any person. "No words spoken or moves made to indicate malice, or intention to harm, and above all—no participation by this defendant in any way to aid or abet or even assist either of the co-defendants in their action.")

In fact, this Court has specifically applied the aider and abettor rule to felony-murder cases.[2] In *Lewis v. State*, 451 P.2d 399 (Okl.Cr.1967) the evidence showed the defendant and two co-defendants planned the robbery of a service station, and that the defendant was the driver of the get-away car and did not enter the premises nor participate in the assault made upon the victim who was robbed, shot and beaten by the co-defendant. This Court found the evidence sufficient to support the conviction for

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[2] This Court has also upheld the application of the aider and abettor rule in several capital cases. *See Torres u. State*, 962 P.2d 3 (Okl.Cr.1998); *cert. denied*, 525 U.S. 1082, 119 S.Ct. 826, 142 L.Ed.2d 683 (1999); *Douglas v. State*, 951 P.2d 651 (Okl.Cr.1997), *cert. denied*, 525 U.S. 884, 119 S.Ct. 195, 142 L.Ed.2d 159 (1998); *Stiles v. State*, 829 P.2d 984 (Okl.Cr.1992); *Van Woundenberg v. State*, 720 P.2d 328 (Okl.Cr.1986), *cert. denied*, 479 U.S. 956, 107 S.Ct. 447, 93 L.Ed.2d 395 (1986); *Hatch v. State*, 662 P.2d 1377, 1382 (Okl.Cr.1983). However, those convictions were for first degree malice aforethought murder and are therefore considered distinguishable from the present case.

murder as a principal under the felony-murder rule. *Id.* at 400. *See also State v. Jones*, 859 P.2d 514, 515 (Okl.Cr.1993) ("Oklahoma law clearly permits prosecutions under our felony-murder statutes where the defendant or an accomplice actually performed the homicidal act.") *See also Oxendine v. State*, 350 P.2d 606, 611 (Okl.Cr.1960), *Carle v. State*, 34 Okl.Cr. 24, 244 P. 833 (1926).

Further, in *Spears v. State*, 900 P.2d 431, 439-440 (Okl.Cr.), *cert.denied*, 516 U.S.301, 116 S.Ct. 678, 133 L.Ed.2d 527 (1995) this Court applied the aider and abettor rule to a charge of felony-murder and rejected the appellant's challenge to the sufficiency of the evidence supporting the underlying felony of robbery. Although Spears did not participate in the taking of the victim's truck, this Court found the evidence sufficiently established that Spears talked with a co-defendant about beating the victim and taking his pickup. This Court further found the evidence showed Spears and his co-defendant carried out their plan by beating and later stabbing the victim and taking his truck, and that Spears directed another co-defendant to take the victim's pickup to Tulsa and sell it. The Court stated that while Spears may not have driven the victim's pickup, his conduct in directing its disposition constituted aiding and abetting sufficient to support the conviction for felony-murder.

Applying the aider and abettor rule to felony-murder is consistent with the Legislature's definition of felony-murder and "is a reflection of the policy that one who, by his willful criminal conduct, sets in motion a chain of events so perilous to the sanctity of human life that death results therefrom must bear the ultimate responsibility for his actions." *Hatch v.*

State, 662 P.2d 1377, 1384 (Okl.Cr.1983). This Court further stated:

> We agree with the legislature that murders affected in such a manner are as abhorrent as those that are premeditated. Proscribing such actions under our first-degree murder statutes performs the rational function of deterring the commission of felonies so inherently dangerous as to create foreseeable risks of death.

662 P.2d at 1384.

Assuming arguendo, the evidence showed Appellant was not in the Bank with Neill at the time of the robbery/homicides, evidence of Appellant's participation in the planning and his active involvement in the steps necessary to ensure completion of the plan is sufficient to find him guilty as a principal to felony-murder.

Appellant's own testimony shows he was fully aware the robbery was to take place and that lives would be taken during the robbery. Appellant admitted to the Sunday night shopping spree, obtaining the gun permit and purchasing the guns and knives, changing the travel plans to leave earlier Friday afternoon than first planned, and spending the money taken in the bank robbery.[3]

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[3] Appellant testified he had hoped the bad check written by Neill to pay for the items would eventually lead to Neill being caught for passing bad checks. He explained getting the gun permit because Neill was too young and had prior felony convictions. Appellant explained the knife purchases as Christmas gifts for Neill'snephews. Appellant said at first he didn't question the gifts, but later thought it inappropriate to buy knives for minors.

Appellant claimed the first he knew of the robbery/homicides was when Neill returned to the apartment after committing the crimes and told him he had just robbed the Bank and killed people. Appellant said even though he was shocked by what Neill told him, he went along with the plans to leave for San Francisco. Testimony from people who saw Appellant and Neill at the airport was that they seemed cheerful and happy, not in the throes of hysteria and shock. Appellant admitted that he and Neill used masking tape to tape bundles of money to their waists before boarding the plane.

Viewed in the light most favorable to the State, the evidence shows a prearranged plan between Appellant and Neill to rob the Bank by use of a dangerous weapon. It may be presumed that Appellant knew and intended the natural consequences of his acts, that being the death of those against whom the weapons are used. *Mosier v. State*, 671 P.2d 62, 67 (Okl.Cr.1983). The evidence shows Appellant took all the necessary steps to ensure that the robbery would come to fruition. His conduct up to the point of the actual commission of the robbery/homicides shows he acted knowingly and with criminal intent. His participation in acquiring the gun permit and the weapons, "casing" the Bank the day before the crimes, rescheduling travel arrangements to leave town immediately after the crimes, and taking the stolen money to and spending it in San Francisco is clear evidence that Appellant aided and abetted Neill in the commission of the robbery/homicides, despite any evidence showing he was not the actual "triggerman" or that he may not have been in the Bank at the time of the homicides. Appellant and Neill together created a situation inherently dangerous to human life. Appellant cannot now disclaim respons-

ibility for his acts. Accordingly, we find the evidence sufficient to sustain Appellant's convictions as a principal for felony-murder. This assignment of error is denied.

In his second assignment of error, Appellant contends the trial court erred in failing to instruct the jury that in order to find him guilty of first degree felony-murder, the jury must initially find he was present when the deaths occurred.

The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court. *Williams v. State*, 22 P.3d 702, 711 (Okl.Cr.2001), *cert. denied*, 534 U.S. 1092, 122 S.Ct. 836, 151 L.Ed.2d 716 (2002). Absent an abuse of that discretion, this Court will not interfere with the trial court's judgment if the instructions as a whole, accurately state the applicable law. *Id.*

As discussed above, this Court has upheld convictions for felony-murder where the defendant was not present at the time of death. *See Spears*, 900 P.2d at 439-440, *Lewis*, 451 P.2d at 400. Therefore, Appellant's requested instruction was properly refused by the trial court as it was not an accurate statement of the law.

A review of the instructions given to the jury in the present case shows a proper and accurate statement of the law. The jury was instructed on the elements of felony-murder and the elements of the underlying offense of robbery with a dangerous weapon. (O.R. 2919-20). The jury was also instructed that the State must prove each element of the charged offense beyond a reasonable doubt. (O.R. 2911, 2917 and 2919-2920). The instructions in this case clearly stated that in order for Appellant to be found guilty

of first degree felony-murder, the State must prove beyond a reasonable doubt that Appellant's conduct caused the death of the persons killed. These instructions adequately set forth the applicable law. Finding no error, this assignment of error is denied.

In his third assignment of error, Appellant contends the trial court erred in denying his request for a lesser included offense instruction on the crime of bank robbery. A defendant is not entitled to instructions on any lesser included offense when he defends against the charge by proclaiming his innocence. *Gilson v. State*, 8 P.3d 883, 918 (Okl.Cr.2000), *cert. denied*, 532 U.S. 962, 121 S.Ct. 1496, 149 L.Ed.2d 381 (2001). Appellant testified he did not participate in the robbery/homicides. Therefore, he was not entitled to an instruction on any lesser included offense. This assignment of error is denied.

Appellant next contends the trial court violated his constitutional rights to due process and confrontation by denying him the opportunity to cross- examine State's witness Steve Murphy on his testimony that he observed Appellant and Neill in the Bank the day before the murders. Specifically, Appellant complains the trial court erred in prohibiting him from using the testimony of a previous State's witness, Denise Donahue, to discredit Mr. Murphy's testimony.

The record reflects that Steve Murphy testified he was working for Hardaway's Insurance in December 1984. His office was located in the Geronimo Bank; however, he worked out of his office only on Tuesdays and Thursdays. Mr. Murphy testified that on Thursday, December 13, 1984, he was in his office at the Bank. Between 1:00 p.m. and 1:30 p.m., he saw Appellant and Neill come into the Bank, stand near the entrance and observe the activity in the Bank.

Mr. Murphy testified Appellant and Neill spoke only to each other, and did not transact any business with the Bank.

On cross-examination, defense counsel sought to confront Mr. Murphy with testimony from Denise Donahue, an employee of A-1 Sundown Travel Agency. Defense counsel argued that Ms. Donahue had testified that Neill was at the Lawton Municipal Airport making travel arrangements with her at 12:55 p.m. on December 13, and that he remained talking with her for another 45 minutes to an hour. The District Attorney objected, arguing defense counsel had mischaracterized the evidence. The trial court sustained the objection, but defense counsel denied mischaracterizing the evidence and repeated his request to question the witness. The trial court called a recess to resolve the issue and the parties retired to the judge's chambers. Based upon the court reporter's paper tape of the last series of questions by the District Attorney to the witness, the trial court ruled defense counsel, "may not categorize the testimony of that witness in the manner in which he seeks to do so by stating that she—that Neill remained there some forty-five minutes after the conclusion of the stamped time of 12:55 on the computer." (Tr. Vol. V., pgs. 1408-1410). Not to be deterred, defense counsel argued that the court reporter should read back the cross-examination of the witness conducted by defense counsel. The trial judge acknowledged that he had not permitted the court reporter to do as defense counsel suggested, but in so doing did not dispute what defense counsel said about the testimony. However, he was not going to allow defense counsel to categorize the testimony as he had done. (Tr. Vol.V., pg.1411).

A review of the record shows Denise Donahue testified on direct examination that she spent approximately two hours with Neill on Thursday December 13, making travel arrangements. On cross-examination, she testified Neill arrived at the airport "somewhere around" 11:00 a.m. She entered his flight reservations into the computer at 12:55 p.m. She testified she could not remember if it was exactly after making the flight arrangements or before she made the arrangements, that she talked to Neill about hotels and limousines. However, she said it was her normal practice to talk about hotel arrangements after flight arrangements had been made. At defense counsel's insistence, Ms. Donahue estimated the amount of time she spent with Neill after making the flight arrangements was 45 minutes .to an hour. On re-direct, she acknowledged she had testified at the original preliminary hearing and trial in this case and she had consistently stated that Neill arrived at 11:00 a.m. and that the total time she spent with Neill that day was two hours.

This record shows that certain portions of Ms. Donahue's testimony were inconsistent with Mr. Murphy's testimony. However, the trial court's refusal to allow defense counsel to cross-examine Mr. Murphy with portions of Ms. Donahue's testimony is not a denial of Appellant's rights to due process and confrontation.

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution guarantees the accused the right to be confronted with the witnesses against him. *Carter v. State*, 879 P.2d 1234, 1246 (Okl. Cr.1994), *cert .denied*, 513 U.S. 1172, 115 S.Ct. 1149, 130 L.Ed.2d 1107 (1995). "Confrontation means more than being allowed to confront the witness physically

. . . The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Cross-examining a witness is the primary method through which the credibility and veracity of a witness are examined. *Walker v. State*, 841 P.2d 1159, 1161 (Okl.Cr.1992) *quoting Davis v. Alaska*. However, it is well established that the scope of cross-examination lies in the sound discretion of the trial court. *Patton v. State*, 973 P.2d 270, 287 (Okl.Cr.1998), *cert. denied*, 528 U.S. 939, 120 S.Ct.347, 145 L.Ed.2d 271 (1999). This Court will not interfere with the trial court's decision to limit cross-examination unless there is an obvious and prejudicial abuse of discretion. *Id.*

In the present case, the trial court did not abuse its discretion. Both Ms. Donahue and Mr. Murphy testified and were subject to cross-examination by defense counsel. Their individual testimonies, including any inconsistencies, were before the jury for their consideration. The right of cross-examination does not extend to asking one witness to comment on the veracity of another witnesses' trial testimony. The inconsistency in the testimony of witnesses is the subject of closing argument by counsel, not a proper subject for cross- examination. Further, no relevant or material evidence was excluded by the court's limitation of cross-examination. Accordingly, we find no abuse of discretion in the trial court's ruling prohibiting defense counsel from cross- examining Mr. Murphy with Ms. Donahue's testimony. This assignment of error is denied.

In his fifth assignment of error, Appellant contends the trial court erred in denying defense counsel the opportunity to refresh Debbie Ward's recollection of

her testimony given in Neill's re-trial. The record shows that during cross-examination, the following occurred:

> Q: (defense counsel) Ms. Ward, you've testified in this case in the past, have you not?
> A: Yes.
> Q: Do you recall that you testified in the retrial of Jay Wesley Neill?
> A: Yes.
>
> . . .
>
> Q: And do you recall that Mr. Schulte asked you this referring to the afternoon of Friday December 14, 1984. "What time did you leave to go back to work, as best you can recall?" Do you recall that he asked you that?
> A: Yes.
> Q: Do you recall that you responded I probably left the apartment about two or three minutes after 1:00 o'clock. Do you recall that you said that?
> A: No, I don't recall saying that.
> Q: You don't recall that you said that?
> A: No, I don't.
> Q: Okay. Would it refresh your recollection if I showed you the transcript?
> A: Sure.
> Q: Okay.
>
> Mr. Barta [defense counsel]: Your Honor, may I approach?
>
> Mr. Schulte (prosecutor]: Your Honor, it's improper. He just quoted from the transcript and she said she didn't recall.
>
> The Court: Sustained.

(Tr. Vol. V., pgs. 1434-35).

Pursuant to 12 O.S. 1981, § 2613(B), defense counsel should have been permitted to refresh the witnesses' recollection with the transcript of her previous testimony. In *Rogers v. State*, 721 P.2d 805, 808 (Okl.Cr.1986) this Court stated:

Title 12 O.S. 1981, § 2613(B) clearly governs this issue:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon.
>
> This rule requires counsel, normally the cross-examiner, to first ask the witness about the prior inconsistency, and then given the witness the opportunity to deny, affirm, or explain the earlier statement. Also imposed upon counsel is the duty of identifying the subject matter of the statement, the time and place of its utterance, and the person to whom it was made.

721 P.2d at 807-808. *See also Neal v. State*, 837 P.2d 919, 921 (Okl.Cr.1992).

Here, Ms. Ward did not recall her previous testimony and responded that her recollection would be refreshed if she could see the transcript of her testimony. While the record is not clear, it appears defense counsel had a copy of the transcript in his possession and was prepared to show it to the witness.

Appellant asserts this error warrants reversing his conviction as the time he left Ms. Ward's apartment "was a key fact in establishing that he could not have

been at the bank at the time Jay Neill committed the crimes." A good deal of Appellant's defense at trial was spent trying to show that he could not have physically traveled the distance between his apartment and the Bank within the estimated time frame of the robbery/homicides. However, on appeal, we have found Appellant can legally be held criminally liable for the robbery/homicides even if he had not been in the Bank at the actual time of the robbery/homicides. Therefore, Appellant has failed to show any prejudice as a result of the trial court's ruling. *See Bland v. State*, 4 P.3d 702, 727 (Okl. Cr.2000), *cert. denied*, 531 U.S. 1099, 121 S.Ct. 832, 148 L.Ed.2d 714 (2001) (appellant must show not only that error occurred but that the resulting prejudice, from the error was such that reversal is warranted). Accordingly, the error was harmless and this assignment of error is denied.

Appellant contends next the trial court erred in refusing to allow his proposed expert witness, Gilbert "Dub" Armstrong, to testify whether it would have been possible to drive from Appellant's apartment to the Bank in seventeen (17) minutes or less.

Mr. Armstrong was a private investigator that had previously been employed in law enforcement, including serving as the El Reno Police Chief for a time. At the request of defense counsel, Mr. Armstrong conducted speed checks between the Tanglewood Apartment Complex where Appellant and Neill had lived and the Geronimo Bank. Mr. Armstrong testified he was asked to take several routes and determine which would be the fastest. He testified he drove approximately 3 different routes, at least 3 to 4 times each. Mr. Armstrong gave the mileage for each route and the time it took travel

each one. He gave his personal opinion as to the fastest route, and the fastest time—17 minutes—which it took to drive that route. Defense counsel was even allowed to present a videotape of one of the trial runs.

However, when defense counsel attempted to elicit testimony from Armstrong whether Appellant and Neill could have driven the route in 17 minutes, the prosecutor objected on the grounds that Armstrong was not an expert. At defense counsel's request, the court allowed counsel the opportunity to try and qualify Armstrong as an expert.

Defense counsel established that Armstrong has experience in law enforcement, and had occasion to measure speed limits using radar and hand-held instruments. Armstrong testified it was his job as a member of the Oklahoma Highway Patrol to detect speeders and enforce traffic laws. Armstrong said he had driven the route he determined to be the quickest way between the apartments and the Bank in excess of ten times. Armstrong testified that based upon his experience and work that he could give expert testimony relating to the time and distance between the Tanglewood Apartments and the Geronimo Bank. Defense counsel then tendered the witness as an expert. The court sustained the prosecutor's objection. Defense counsel again asked Armstrong whether, based upon his experience in law enforcement, an automobile with 4 cylinders and 82 horsepower could travel between the apartment complex and the Bank in 17 minutes or less. The prosecutor objected again, arguing improper foundation and improper request for an opinion. The objection was sustained. At the close of Armstrong's direct examination, defense counsel made a proffer of

Armstrong's testimony if he had been allowed to testify as an expert.

The introduction of expert testimony is governed by 12 O.S. 1981, § 2702, which provides that "(i)f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise." Additionally, 21 0.8.1981, § 2704 provides that "(t)estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." An expert witness is defined as one who is possessed of scientific knowledge acquired by study or practice, or by both. *Salazar v. State*, 919 P.2d 1120, 1129 (Okl.Cr.1996), *Kennedy v. State*, 640 P.2d 971, 977. (Okl.Cr.1982). Experts are ordinarily persons who have experience and knowledge in relation to matters that are not generally known. *Id.* The decision as to the sufficiency of qualifications of potential expert witnesses is within the sound discretion of the trial court. *Id.*

Contrary to Appellant's claim, Armstrong was not properly qualified as an expert in accident reconstruction. Armstrong testified that as a private investigator he had performed accident reconstruction work. However, he did not elaborate on this work and said he had also done some domestic work and motor safety work. His experience in law enforcement was not sufficient to qualify him to render an expert opinion on whether a certain type of car could drive a particular route in a specified amount of time. No evidence of facts or data of a type reasonably relied upon by experts in the field of accident reconstruction

was offered. Armstrong's experience in driving the routes several times was sufficient to support his personal opinion, but insufficient to support an opinion as an expert. Accordingly, the trial court did not abuse its discretion in refusing to allow Armstrong to testify as an expert witness. This assignment of error is denied.

In his seventh assignment of error, Appellant complains he was denied a fair trial by the prosecutor's comments on his sexual orientation. Initially, Appellant contends that in opening statement and closing arguments the prosecutor improperly commented on "love letters" between Appellant and Neill found in Neill's car. These comments were not met with contemporaneous objections. Therefore, we review only for plain error. *Bland*, 4 P.3d at 726.

The State presented evidence showing these letters had been found in Neill's car after the robbery/homicides, lying next to a bloody. knife. Prosecutors are entitled to fully discuss the evidence from their standpoint, drawing all logical inferences and deductions arising from that evidence. *Romano v. State*, 847 P.2d 368, 380 (Okl.Cr.1993), *affd*, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). The prosecutor's comments in this instance were reasonably based on the evidence.

Next, Appellant asserts he was improperly questioned by the prosecutor on cross-examination concerning his relationship with Neill. The record shows the prosecutor was well within the scope of cross-examination as Appellant specifically testified to his relationship with Neill. Appellant admitted that he was in a homosexual relationship with Neill. Appellant portrayed Neill as the dominant member of the relationship and himself as the passive member.

Appellant's defense to his participation in any aspect of the crimes was that he was under Neill's domination and acted as he did because of his relationship with Neill. This Court has repeatedly held that prosecutorial remarks are not grounds for reversal where they are invited, provoked or occasioned by defense counsel. *Bland*, 4 P.3d at 729-730, *Teafatiller v. State*, 739 P.2d 1009, 1010 (Okl. Cr.1987). Here, the prosecutor's comments were invited by Appellant's direct examination.

Appellant further argues the prosecutor repeatedly made comments regarding his homosexual activities that had nothing to do with his relationship with Neill, and were clearly irrelevant and prejudicial. Specifically, he refers to comments and questioning by the prosecutor that while in San Francisco, Appellant visited "gay areas" and "gay bars" and that he and Neill stayed in a "gay hotel".

Certain information concerning Appellant's activities in San Francisco was relevant in showing Appellant's conduct leading up to his arrest and apprehension. *See Salazar v. State*, 852 P.2d 729, 736 (Okl.Cr.1993). To use Appellant's description, any "gratuitous" comments, or comments which improperly emphasized Appellant's homosexuality is not cause for reversal. Allegations of prosecutorial misconduct should not cause a reversal of judgment or modification of sentence unless their cumulative effect is such as to deprive the defendant of a fair trial and fair sentencing proceeding. *Pickens v. State*, 850 P.2d 328, 343 (Okl.Cr.1993), *cert. denied* 510 U.S. 1100, 114 S.Ct. 942, 127 L.Ed.2d 232 (1994). In considering whether the prosecutor's comments rendered the trial fundamentally unfair, we review the comments in context, considering the evidence

and whether the remarks can be said to have influenced the verdict against the appellant. *Id.* Here, we are not persuaded that any improper remarks seriously affected the fairness of the trial. Although Appellant disputed much of the State's evidence, the evidence of guilt was substantial. Considering also the jury instructions given in this case, we find the prosecutor's comments did not improperly influence the jury's consideration of the evidence.[4] Accordingly, Appellant was not denied a fair trial by the prosecutor's comments on his sexual orientation.

. In his eighth assignment of error, Appellant complains about the introduction of evidence concerning his cocaine use while in San Francisco. Appellant argues the evidence was not relevant as it was not necessary to the. State's burden and it was highly prejudicial. Appellant argues the trial court erred further in failing to give a limiting instruction at the time the evidence was introduced and in the final jury instructions.

This identical issue was raised by Neill in his direct appeal. In rejecting Neill's claim of error, this Court found the evidence properly admitted as "evidence of the events occurring in San Francisco were so closely related to the bank robbery and

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[4] Appellant asserts the Tenth Circuit Court of Appeals found the same comments made by the same prosecutor in the retrial of Jay Neil to be improper. *See Neil v. Gibson*, 263 F.3d 1044 (10th Cir.2001). However, Appellant's argument is based upon a dissenting opinion. A majority of the Court found any improper comments harmless error stating, "we cannot say that they tipped the scales of justice in the State's favor or precluded jurors from considering evidence fairly." *Id.* at 1061.

murders that they formed a logical connection with the charged offenses so as to be relevant evidence." 896 P.2d at 551. This Court further stated, "the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice or harmful surprise" as the State included this evidence in its pre-trial Notice of Evidence of Other Crimes, and the trial court instructed the jury on the limited use of this evidence. *Id.*

In the present case, evidence of Appellant's purchase and use of cocaine emerged as the natural sequence of events of the crime and the perpetrators' apprehension was set forth. The evidence was relevant to establish that proceeds from the robbery were used to fund the trip to San Francisco and the ensuing spending sprees. It was the use of the marked bills in the spending sprees, which ultimately led to Appellant's apprehension. Therefore, the court properly found the evidence relevant.

As in *Neill*, evidence of the cocaine purchase and use was included in the State's pre-trial Notice of Evidence of Other Crimes. Therefore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice or harmful surprise. Additionally, the jury was properly instructed on the limited use of the evidence.[5] There is

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[5] Instruction No. 34 provided:

> Evidence has been received that the defendant has allegedly committed offenses other than that charged in the information. You may not consider this evidence as proof of the guilt or innocence of the defendant of the specific offense charged in the information. This evidence has been received solely on the issue of the defendant's alleged motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. This evidence is to

no indication in the record the jury did not follow their instructions. *See Williams*, 22 P.3d at 716 (juries are presumed to follow their instructions). Therefore, we find this evidence was properly admitted at trial.

Appellant argues in his ninth assignment of error that he was denied a fair trial by the admission of his statements in letters to Paul Dunn. Mr. Dunn had contacted Appellant in prison and told him he wanted to write a book about Appellant and Neill's story. Appellant now complains the prosecutor repeatedly questioned him regarding his statements to Dunn in which Appellant indicated he thought he could make money by turning the story of the Geronimo Bank robbery into a book or movie. Appellant also complains the prosecutor improperly questioned him concerning statements he made insulting Oklahomans, statements made wherein he used profanity and statements regarding his sexual orientation. Appellant asserts the prosecutor's questioning had no bearing on his guilt or innocence and was completely irrelevant and inflammatory so that any possible probative value was outweighed by unfair prejudice.

Appellant's defense was that he did not participate in the robbery/homicides and was unaware of Neill's plans to rob the Bank. Appellant also testified that he had a "horrible" childhood, that he was abused by his stepfather, and that he watched his stepfather abuse his mother, which resulted in his passive nature.

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be considered by you only for the limited purpose for which it was received.

(O.R. 2940).

This is the same instruction approved in Neill, 896 P.2d at 551. n. 8.

To rebut that defense, the prosecutor introduced statements Appellant had made in his letters to Mr. Dunn. In these letters, Appellant attempted to elicit money for his accounting of the robbery/homicides. Appellant said in part, "I know I have a good story and I know it will make a great book/movie. I'm just waiting for a reasonable financial opportunity. I feel it's only fair, I'm eager and ready." Defense counsel's objections on the grounds of relevance were overruled. Appellant admitted to signing a contract with Dunn with any money he would receive going to his mother.

Appellant also admitted to writing to Mr. Dunn that he enjoyed growing up, and loved school. No objection was raised by defense counsel. Appellant wrote in another letter of his experiences with school counselors in regards to people calling him names, but never in regards to problems with his stepfather. In one letter, Appellant even stated, "I would complain to the counselors just to make them aware how immature these dumb Oklahoma hicks were." Again, the prosecutor's inquiry was not met with an objection.

While certain of the above prosecutorial inquiries Appellant now challenges were met with timely objections at trial, others were not. Reviewing the challenged comments for reversible error, plain or timely preserved, we find the comments did not deny Appellant a fair trial. As a general rule, any matter is a proper subject of cross-examination which is responsive to testimony given on direct examination or which is material or relevant thereto and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness. *Grant v. State*, 58 P.3d 783, 794 (Okl.Cr.2002) citing *Smith*

v. State, 695 P.2d 864, 868 (Okl.Cr.1985). It has long been a rule of the Court that when a defendant opens up a field of inquiry on direct examination, he may not complain of subsequent cross-examination. *Ashinsky v. State*, 780 P.2d 201, 206 (Okl.Cr.1989). The extent of cross-examination rests in the discretion of the trial court and reversal is only warranted where there is an abuse of discretion resulting in prejudice to the defendant. *Grant*, 58 P.3d at 794.

The prosecutor's inquiry into Appellant's letters to Paul Dunn was not beyond the scope of direct examination in this case. While the letters themselves were not raised on direct examination, their content directly rebutted Appellant's claims of innocence and ignorance. The letters also rebutted his pleas for sympathy based upon an unfortunate childhood. Accordingly, we find the trial court did not abuse its discretion in allowing the inquiries into Appellant's letters to Paul Dunn. This assignment of error is denied.

In his tenth assignment of error, Appellant complains he was denied a fair trial by the admission of an excessive number of 8" x 10" color photographs of the crime scene and the victims. Appellant's trial objections have properly preserved the issue for appellate review.

The admissibility of photographs is a matter within the trial court's discretion. *Neill*, 896 P.2d at 551-52. Absent an abuse of that discretion, this Court will not reverse the trial court's ruling *Id.* Photographs are admissible if their content is relevant and unless their probative value is substantially outweighed by their prejudicial effect. *Id. See also* 12 O.S.1981, § 2403.

The photographs introduced in this case were of the crime scene, including the bank lobby and the back room where the victims were found. Photographs also showed the murder victims' numerous wounds. Appellant's argument that the photos were not relevant as the cause of death was not contested was addressed and rejected in *Williamson v. State*, 812 P.2d 384, 400 (Okl.Cr.1991), *cert. denied* 503 U.S. 973, 112 S.Ct. 1592, 118 L.Ed.2d 308 (1992). While the defendant may not contest the victim's cause of death, it remains the State's burden to prove, first, the corpus delicti, and second, that the crime was committed by the accused. *Id.* Pictures of the murder victim are always useful in establishing the corpus delicti of the crime. *Id.*

Further, the probative value of photographs of murder victims can be manifested numerous way including, as in the present case, showing the nature, extent, and location of wounds, depicting the crime scene, and corroborating the medical examiner's testimony. *Neill*, 896 P.2d at 551-52. The fact that the pictures are gruesome does not of itself cause the photographs to be inadmissible. *Id.*

We find the photographs in this case were not so repetitious as to be prejudicial. There is a point in the display of relevant photographs where the photographs are so duplicative that a needless repetition can inflame the jury and result in error. *President v. State*, 602 P.2d 222, 226 (Okl.Cr.1979). The burden is on the Appellant to prove that he was injured by the error. *Id.* The photos in the present case accurately reflected the injuries inflicted upon the four (4) different murder victims. The photos, which were taken by the medical examiner, were taken prior to the start of the autopsy. As the photos corroborate

the medical examiner's testimony and illustrate the wounds received by the victims, we find their probative value is not substantially outweighed by any prejudicial effect. Accordingly, this assignment of error is denied.

Appellant contends in his eleventh assignment of error that the prosecutor altered key evidence and argued that the same single sketch of the person seen inside the Bank could be both Appellant and Neill.

The record shows that Bellen Robles testified she had given investigators a description of the person she saw inside the Bank and based upon that description a composite drawing was made. Arnold Bentz, an Oklahoma State Bureau of Investigation (OSBI) chemist, testified he took the information from Mrs. Robles and drew the composite sketch. The prosecutor moved to introduce the composite drawing as State's Exhibit No. 39. Defense counsel objected, arguing that when the exhibit was shown to the witness, a photograph of Neill was attached to the corner. However, the prosecutor had just removed the photograph and therefore improperly modified the exhibit. The trial court inquired of defense counsel whether he had any knowledge that the witness had placed the photograph on the drawing or whether he in any way caused the exhibit to be in that condition. Defense counsel responded in the negative, and the trial court overruled the objection.

Appellant further directs us to closing arguments wherein the prosecutor discussed the similarities between Appellant's facial features and those of Neill and argued that the composite drawing resembled both men. The prosecutor's comments were not met with contemporaneous objections.

In support of his argument, Appellant relies on *United States v. Kattar*, 840 F. 118 (1st Cir. 1988). However, we find *Kattar* is distinguishable as it concerns Rule 801(d)(2) of the Federal Rules of Evidence and the prosecution's inconsistent use of evidence in different trials.

Unlike the prosecutor in *Kattar*, there is no indication the prosecutor in the present case was inconsistent in his use of the evidence. Appellant argues the prosecution used the composite drawing, with Neill's photograph attached, in Neill's trial to argue that the drawing resembled Neill. While this is a logical assumption, there is nothing in the record before us to support it. Further, there is nothing in the record to support the State's admission that it was the prosecutor himself who attached the photograph of Neill to the composite drawing. What the record does show is that the prosecutor argued that the composite drawing could resemble either Appellant or Neill. Any inconsistency in this argument was cleared up by Bellen Robles testimony that she identified Neill as the person she saw in the Bank, and that she identified Neill as the person in the composite drawing. Any error in the prosecutor's argument did not influence the verdict, when considered in light of the evidence against Appellant. *See Pickens*, 850 P.2d at 343. Accordingly, we find Appellant was not denied a fair trial.

Next, Appellant argues in his twelfth assignment of error that the introduction of a second, bloody knife denied him a fair trial, as the State did not establish a sufficient chain of custody.

"The purpose of the chain of custody rule is to guard against substitution of or tampering with the evidence between the time it is found and the time it

is analyzed." *Wilson v. State*, 983 P.2d 448, 462 (Okl.Cr.1998) *quoting Middaugh v. State*, 767 P.2d 432, 436 (Okl.Cr.1988). While it is the State's responsibility to show the evidence offered is in substantially the same condition at the time of offering as when the crime was committed, it is not necessary that all possibility of alteration be negated. *Id.* If there is only speculation that tampering or alteration occurred, it is proper to admit evidence and let what doubt there may be go to its weight rather than render the evidence completely inadmissible. *Id.*

Arnold Bentz testified he found a knife at the scene of the murders that had some blood on the handle but none on its blade. Bentz stated he placed the knife in a sealed envelope and initialed the envelope. The sealed envelope was taken to the Lawton regional laboratory and later transferred to the FBI in Washington D.C., for testing. On cross-examination, defense counsel tried to establish that before the envelope was transferred to the FBI it had been unsealed. Bentz testified that the envelope was sealed when it was sent to the FBI and he had no knowledge of what happened to it after its transfer.

Agent William Eubanks, FBI, testified he received a package containing a knife, which was identified as having been found at the Bank. Agent Eubanks said he tested the knife for the presence of human blood. Eubanks had no other recollection concerning the container the knifed arrived in.

When the prosecutor attempted to admit the knife, marked as State's Exhibit 12, into evidence, the defense objected. The prosecutor admitted he had been "lax" on the chain of custody, but he understood there was an agreement that the chain of custody of the physical evidence would not be an issue. The

prosecutor admitted the original containers holding the evidence has been discarded long ago, but he had presented testimony from the FBI agents, which handled the evidence, and which he believed sufficiently established the trial the evidence followed.

In a bench conference, defense counsel argued that the evidence would show that before the envelope containing the knife was sent to the FBI, the envelope was unsealed, the knife taken out and used at the autopsy of Kay Bruno where it was inserted into one of her wounds. Defense counsel argued that evidence raised serious questions as to the integrity of the testing of the knife and any blood contained on it. Defense counsel argued further the issue of blood on the knife was relevant on the issue of whether the knife was actually used in the murders or simply fell out of a pocket. The trial court overruled the defense objections and admitted into evidence State's Exhibit 12.

Subsequently, OSBI Agent Richard Goss testified he and Bentz were present at the autopsies. Agent Goss testified the Medical Examiner, Dr. Boatman, had a question about the knife that was found at the scene. Goss said Bentz retrieved the knife he had collected from the Bank, removed it from its envelope, and held it up. Goss said Dr. Boatman, who was standing across the room, looked at the knife and Bentz placed the knife back in its envelope and removed it from the room. Goss said neither he nor Dr. Boatman handled the knife, that only Bentz handled it.

Dr. Boatman acknowledged he had testified a number of times in this case. The prosecutor went over a transcript where there was some indication that a knife or something similar to a knife had

been inserted into a wound during an autopsy. Dr. Boatman said he recalled the passage but said the prosecutor's description was not an accurate interpretation. Dr. Boatman testified it was a metal probe that had been inserted into the wounds. He said that was standard procedure in an autopsy and was used to determine the direction and depth of the wound. Dr. Boatman said that never in his long career, having done approximately 100 autopsies, had he ever inserted a knife into a victim.

On cross-examination, defense counsel reviewed with Dr. Boatman his previous testimony where he indicated a knife had been placed into a wound. Dr. Boatman admitted his response had been poorly worded and it did sound as if a knife had been inserted. He explained that it had not been a knife but a metal probe that had been used during the autopsy.

Here, the State's evidence showed the knife was substantially in the same condition at the time of offering as when it was found in the Bank. At best, the record offers only speculation that the knife might have been tampered with prior to its examination by the FBI. Therefore, the trial court properly admitted the evidence with any doubts going to the weight to be given the evidence by the jury. Accordingly, this assignment of error is denied.

In his thirteenth assignment of error, Appellant asserts he was denied a fair trial by the prosecution's knowing use of false evidence in the form of testimony by jailhouse snitch Herman Williams. Appellant relies on *Omalza v. State*, 911 P.2d 286, 307 (Okl.Cr.1995) to argue the knowing use of false or misleading evidence important to the prosecution's case in chief violates the Due Process Clause of

the Fourteenth Amendment. In *Omalza* we stated, "No prove the claim on appeal the appellant bears the burden to establish (1) certain testimony was misleading, (2) the prosecution knowingly used the testimony and (3) the testimony was material to guilt or innocence. *Id.*

In response to a defense objection concerning William's testimony, an *in- camera* hearing was held to determine the admissibility of the testimony. In that hearing it was established that Williams was then incarcerated at Joseph Harp Correctional Center and had been so for approximately the past five years. Williams said he was serving a life sentence for possession of cocaine with intent to distribute. He admitted to pleading guilty to "three assaults and battery with a dangerous weapon" for which he received three ten year sentences to run concurrently with his life sentence. He also admitted to having been convicted of and serving time for intimidation of a State's witness, "subordination" of perjury, and conspiracy to commit perjury. Williams testified that Appellant approached him while in jail and told him he was involved in the Geronimo Bank robbery and murders.

Williams also testified that Appellant's trial was the second time he had provided information to law enforcement since he had received his life sentence, and that previously he had provided information on several occasions in drug cases. Williams said he was aware the District Attorney had made a request on his behalf to the Pardon and Parole Board for leniency. He said he did not expect to receive any further requests for leniency from the State and was testifying because of a religious experience he had experienced since being incarcerated. Williams

admitted he had waited four years before he told the authorities about his conversation with Appellant.

At the conclusion of his examination of Williams, defense counsel renewed his objection to the testimony. After hearing argument from both sides, the trial court ruled the testimony admissible and its weight and credibility were for the jury's determination.

Appellant has failed to show the State knowingly used false testimony. Merely because Williams' testimony was contradicted by Appellant's testimony does not make it false. Further, if anything had been left out during the State's direct examination about Williams' criminal history or his decision to tell law enforcement about his Appellant's statements, it was certainly brought out by the defense on cross-examination. Cross-examination was very thorough and Williams' criminal history and reason for testifying was fully presented to the jury. Further, Williams' credibility to a certain extent was impeached on cross-examination. Having reviewed the record, we find Appellant has failed to demonstrate the State knowingly used false evidence. This assignment of error is denied.

Appellant next argues he was denied a fair trial by the admission of Marilyn Roach's testimony. Ms. Roach was the only victim to testify she heard two different voices in the Bank at the time of the robbery. Appellant asserts her testimony was not trustworthy as it was based in part on her belief that God spoke to her and referred to the perpetrator of the crime in the plural form. Further, he contends the testimony is not trustworthy because Ms. Roach admitted she heard the conversation between the two robbers after she had been shot twice in the head and

had lost consciousness. Citing to an FBI report included in the original record, but not introduced at trial, the FBI agent in charge of the investigation into the robbery/murders concluded Ms. Roach had been "hallucinating" when she thought she heard the conversation between two people in the bank. Appellant argues that under these circumstances, the trial court should not have allowed Ms. Roach to testify about her "hallucinations" which lacked even the most basic indicia of reliability.

Appellant fails to cite any legal authority to support his allegations. Absent plain error we will not address assertions unsupported by legal authority. *Romano v. State*, 909 P.2d 92, 117 (Okl.Cr.1995), *cert. denied*, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996).

Every person is competent to be a witness except as otherwise provided in the Oklahoma Evidence Code. 12 O.S. 1981, § 2601. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. 12 O.S.1981, § 2602. Evidence to prove personal knowledge may consist of the witness's own testimony. *Id.*

Marilyn Roach testified to matters of which she had personal knowledge. The weight and credibility of her testimony was exclusively for the jury's determination. *Woodruff v. State*, 846 P.2d 1124, 1134 (Okl.Cr.1993), *cert. denied* 510 U.S. 934, 114 S.Ct. 349, 126 L.Ed.2d 313 (1993). As we stated in *Martinez v. State*, 984 P.2d 813, 824 (Okl.Cr.1999),

cert. denied, 529 U.S. 1102, 120 S.Ct. 1840, 146 L.Ed.2d 782 (2000):

> Determining the weight and credibility of witness testimony, therefore, has long been held to be the "part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men." Scheffer, 523 U.S. at ___, 118 S.Ct. at 1266, quoting Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88, 11 S.Ct. 720, 724-25, 35 L.Ed. 371 (1891).

Accordingly, we find no plain error in the trial court's admission of Marilyn Roach's testimony. This assignment of error is denied.

In his fifteenth assignment of error, Appellant asserts that a juror who was opposed to conviction was improperly removed from the jury. The record shows that Juror Karen Nobis was removed the jury at the State's request after the first stage verdict had been handed down and prior to the start of second stage proceedings. Appellant asserts, "the prosecutor was seen eavesdropping on the jury's deliberations through the deliberation-room door." Appellant argues the prosecutor learned that Juror Nobis "was not favorably disposed to the State's case." Appellant contends that after he was convicted, the prosecutor set out to remove Juror Nobis from the jury. Appellant asserts that Juror Nobis was then "subjected to extraordinary scrutiny, on an entirely selective basis." He contends the removal of Juror Nobis from the panel was not the enforcement of court rules, but jury tampering. In support of his allegation of error, Appellant cites only one case, *United States v. Olano*, 507 U.S. 725, 737, 113 S.Ct. 1770, 1779, 57 L.Ed.2d 973 (1993), for the proposition that "it is a cardinal

principle that the deliberations of the jury shall remain private and secret."

The controversy over Juror Nobis' service on the jury comprised approximately 67 pages of the transcript. (Tr. Vol. IX, pgs. 2524-2591). To briefly summarize, the prosecutor informed the court after the return of the first stage guilty verdict and before the start of second stage proceedings, that he had a concern with Juror Nobis. The prosecutor explained that because of the juror's reactions during his first stage closing argument, he became concerned she would not give the State's case full consideration. The prosecutor said he remembered that on *voir dire*, the juror had said she had been involved in a divorce proceeding. In an attempt to discover a reason why the juror might not give the State's case full consideration, the prosecutor looked into her divorce file. The file reflected that Juror Nobis had been represented by Mr. Jay Walker. Mr. Walker had represented Appellant in his first trial. The prosecutor believed that Juror Nobis had not been forthcoming and had misled the court with her responses on *voir dire* that Mr. Walker did not get involved in her case. It was later established that Mr. Walker had filed a response for Ms. Nobis and then withdrawn from the case.

The prosecutor further informed the court that it had come to his attention only that morning that Juror Nobis had talked about the case to others over the weekend, in direct violation of the court's admonition not to talk about the case. The prosecutor said he had a witness who was a close personal friend of Juror Nobis and who worked at the local radio station who would testify that Juror Nobis had talked to her about the case while the trial was in progress.

The prosecutor was unable to contact this witness and she did not appear before the court.

The prosecutor did present the testimony of Evelyn Nobis, the juror's mother-in-law. Mrs. Evelyn Nobis testified that Karen Nobis talked with her over the weekend (after the first stage verdict had been returned) and made comments about the evidence in the case, stating she didn't feel like the State had proved Appellant was in the Bank, and that she thought Appellant would likely receive life in prison or life without parole as punishment. Mrs. Nobis also testified that Karen Nobis had retained Jay Walker as her attorney in her divorce proceedings.

After hearing extensive argument from both sides, and reviewing case law provided by the State, the trial court removed Juror Nobis from the jury and replaced her with an alternate juror. In so ruling, the court stated, "[b]ased primarily upon the statements made by the juror on *voir dire* but also taking into consideration the entirety of the actions of the juror and discussions with the mother-in-law, I will grant the relief requested by the State, remove the juror Nobis and replace her with the first alternate." (Tr. Vol. IX, pgs. 2587-2588). Defense counsel moved for a mistrial as to both the first and second stages due to the juror's removal. The motion was denied.

The parties acknowledged that at the time of Appellant's trial there were no Oklahoma cases addressing the removal of a juror and replacement with an alternate between the stages of a two stage trial. To support its position, the State relied on Oklahoma cases concerning the replacement of a sitting juror during a one stage trial. *See Davis v. State*, 634 P.2d 752, 754 (Okl.Cr.1981), *Bennett v. Shumate*, 586 P.2d 333 (Okl.Cr.1978), *Washington v.*

State, 568 P.2d 301, 308 (Okl.Cr.1977).[6] The State also relied on cases from other jurisdictions including *People v. Price*, 821 P.2d 610 (Cal.1992), which the trial court found particularly helpful.

Although not addressed at trial, the statutes in effect at the time offer guidance. Title 22 0.5.1991, § 601a provided for the replacement of a regular juror with an alternate before final submission of the cause to the jury where the regular juror had been discharged due to illness or death. "Final submission of the cause" in a two stage proceeding occurs when the jury retires to deliberate upon the sentence in the punishment or second stage of the proceedings." 22 0.S.1991, § 601b. The language in section 601a concerning the reasons for replacement of a seated juror is not exclusive and has been expanded to include situations other than illness or death. *Washington*, 568 P.2d at 308. The reasons for replacement of a juror listed in § 601b likewise are not exclusive.

Further, the trial judge has the inherent power to substitute jurors for good cause. *Id.* In *Bennett v. Shumate*, 586 P.2d 333 (Okl.Cr.1978), this Court found the trial court is vested with the discretion to discharge a jury or juror(s) from giving a verdict whenever there is a manifest necessity. *See also Davis*, 634 P.2d at 754.

Since Appellant's trial, *Matthews v. State*, 45 P.3d 907 (Okl.Cr.), *cert. denied*, 537 U.S. 1074, 123 S.Ct. 665, 154 L.Ed.2d 570 (2002), not cited in either appellate brief, has been decided. In *Matthews*, the appellant complained he was denied due process and a fair trial because jurors in his case

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[6] *Superceded by statute on other grounds, White v. State*, 674 P.2d 31 (Okl.Cr. 1983).

were exposed to and engaged in unauthorized communications regarding the merits of the case during first stage deliberations and again between first stage verdict and the second stage. The issue had been raised at trial and the court had conducted a hearing on the issue. This Court stated, "[b]ecause this juror misconduct issue was litigated and involves the factual issues of whether there were improper communications that resulted in the jury considering extraneous information in rendering its verdict, we defer to the trial court's ruling unless it is clearly erroneous." 45 P.3d at 912. That is the standard of review we will apply to the present case.

In *Matthews*, the claim stemmed from a communication that occurred between a juror and an alternate juror following the first stage verdict but before the beginning of the second stage. This Court stated:

> We have held that "[w]hen the alleged misconduct occurs subsequent to the submission of the case to the jury, the misconduct is presumed to have prejudiced the defendant and it is incumbent upon the State to show that he was not prejudiced." *Wacoche v. State*, 1982 OK CR 55, ¶ 14, 644 P.2d 568, 572. "However, where it appears that a juror converses with third parties during the trial and prior to deliberations, there must be a showing by the defendant that he was prejudiced." *Id.* Here, the contact occurred after the guilty verdict was reached and first stage deliberations ended, but before the beginning of the second stage. Based on *Wacoche* and the timing of the conversation, Matthews was required to show that he was prejudiced by the

> contact. Because first stage deliberations had ended and a verdict had been reached, we find, like the trial court, that the contact in no way affected the. first stage verdict.

45 P.3d at 912-913

The Court next determined the effect of the contact on second stage proceedings. The Court stated, "[s]econd stage is a separate proceeding solely to determine punishment and it is not error to allow the jury to separate after its verdict in the first stage of a bifurcated proceeding prior to the submission of any evidence in the second stage." *Id.* at 913. Based upon the evidence in the case, the Court found the appellant had failed to prove he was prejudiced by any inappropriate conversation. *Id.*

In the present case, the trial court discharged the sitting juror for two reasons. The first reason was that she was not completely forthcoming with her answers on *voir dire.* Although the trial court did not call Ms. Nobis to testify during the *in-camera* hearing, the court thoroughly reviewed the appropriate recorded portions of *voir dire.* Based upon that record, we cannot find the trial court's removal of the juror clearly erroneous.

The second reason for discharging Juror Nobis was her violation of the court's admonition not to discuss the case with anyone. The testimony at the *in-camera* hearing showed Juror Nobis discussed the case with someone outside the jury, giving her opinion of the evidence and indicating a predetermination of Appellant's sentence. These statements were a clear violation of the trial court's repeated admonitions not to talk with anyone about the trial. The statements also showed a violation of the juror's oath. *See* 12 O.S.

1991, § 581. The trial court's removal for this reason was not clearly erroneous.

Based upon *Matthews* and the timing of the conversation, Appellant is required to show that he was prejudiced by the conversation and subsequent removal of the juror. Because first stage deliberations had ended and a verdict had been reached, we find the conversation and subsequent removal in no way affected the first stage verdict. As for second stage, Juror Nobis had indicated she thought Appellant would not receive the death sentence. With the alternate juror on the panel that decided the sentence, evidence was found to support three aggravating circumstances. However, the death penalty was rejected and Appellant received life in prison without parole. We find he has failed to show any prejudice.

In conclusion, the trial court removed Juror Nobis and replaced her with the alternate in order to secure a fair and impartial jury. As Appellant has failed to show any prejudice, we find the trial court properly substituted the sitting juror with the alternate.[7] Accordingly, this assignment of error is denied.

Appellant argues in his sixteenth assignment of error the trial court erred in refusing to give his requested instruction directing the jury that it could

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[7] Appellant began his proposition of error with the principle that the deliberations of the jury shall remain private and secret, and with the claim that the prosecutor was seen eavesdropping on the jury's deliberations. For the record, the trial judge specifically noted that defense counsel stood at the door during deliberations longer than the prosecutor. The defense will be hard pressed to receive relief from conduct in which they also participated.

not attribute the conduct of Jay Neill to Appellant when determining the appropriate sentence. Appellant's only citation of authority in support of his argument is *Lockett v. Ohio*, 438 U.S.586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) where the Supreme Court held that "individualized decision is essential in capital cases."

Initially, *Lockett* specifically deals with individualized sentencing when the death penalty is imposed. As Appellant did not receive the death penalty, *Lockett* is not applicable. Further, the requested instruction was a second stage instruction that informed the jury that if they found Jay Neill's conduct heinous, atrocious and cruel, they could not attribute that to Appellant. Once again in light of the jury's rejection of the death penalty, this claim of error is moot.

In his seventeenth and final assignment of error, Appellant asserts he was denied a fair sentencing proceeding by comments of the prosecutor during second stage closing argument. Appellant argues the prosecutor's repeated admonitions for the jurors to be strong and do their duty influenced their decision and resulted in a harsher sentence than he might have otherwise received.

> Initially, Appellant directs us to the following comment:
>
> Bring your common sense to this case. Any time you have a death, four deaths, four additional people shot, of this magnitude, and the individuals for what reason so that [they] can take the money, hit the gay bars, party and do cocaine and go on a shopping spree in San Francisco . . . I pray that you're strong enough—there is only

> one verdict—to get up, go in that deliberation room, render your decision, make it unanimous. Those of you that are strong on this jury work on the weak.

(Tr. Vol. IX, pg. 2777).

Defense counsel objected only to the reference to the weak, and not any other part of the comment reprinted above. (Tr. Vol. IX, pg. 2778). Accordingly, Appellant's complaints on appeal concerning "yet another gratuitous reference to [Appellant's] homosexuality" have been waived for all but plain error. *Mayes v. State*, 887 P.2d 1288, 1321 (Okl.Cr.1994), *cert. denied*, 513 U.S. 1194, 115 S.Ct. 1260, 131 L.Ed.2d 140 (1995). A prosecutor has the right to discuss evidence during the second stage in arguing for an appropriate punishment. *Id*, at 1322. The comment in the present case was based on the evidence. Therefore, we find no plain error.

Further, it is not error for the prosecutor to focus on the jury's duty to serve and render a verdict based upon the evidence or acknowledge to the jury the difficulty of their task and ask them seriously to consider the punishment options available. *Bland*, 4 P.3d at 727. The comments here are not equivalent to those in other cases that we have held to be improper and prejudicial as playing on societal alarm or as inflaming the passions or prejudices of the jury. *See Suitor v. State*, 629 P.2d 1266, 1268-9 (Okl.Cr.1981). The comments focused on the duty of the jurors to serve and render a verdict based upon the evidence.

Appellant next argues the prosecutor improperly asked the jury to have sympathy for the victims and not to show any mercy or pity for the defendant. The citation to the record for this comment shows defense

counsel's objection was to a part of the argument, which referred to what had been done by "jurors before you." No objection was made to the comments now challenged on appeal. Therefore, we review those comments only for plain error.

It is improper for the prosecution to ask jurors to have sympathy for victims. *Tobler v. State*, 688 P.2d 350, 354 (Okl.Cr.1984). However, the prosecution, as well as the defense, has the right to discuss fully from their standpoint the evidence, and the inferences and deductions arising therefrom. *Bland*, 4 P.3d at 727-728. The prosecutor's reference to the "horrible, horrible death" that four people in this case experienced was based on the evidence and not merely an appeal for sympathy.

Allegations of prosecutorial misconduct do not warrant reversal of a conviction unless the cumulative effect was such to deprive the defendant of a fair trial. *Duckett v. State*, 919 P.2d 7, 19 (Okl. Cr.1995). Because we do not find that any comments deprived Appellant of a fair sentencing proceeding, this assignment of error is denied.

DECISION

The Judgments and Sentences are AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY THE HONORABLE JACK BROCK, DISTRICT JUDGE

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OPINION BY: LUMPKIN, J.
JOHNSON, P.J.: CONCUR IN RESULT
LILE, V.P.J.: CONCUR
CHAPEL, J.: CONCUR IN RESULT
STRUBHAR, J.: CONCUR IN RESULT

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 06-6260

ROBERT GRADY JOHNSON,
Petitioner-Appellant,
v.
MIKE MULLIN, Warden,
Respondent-Appellee.

ORDER
Filed November 26, 2007

Before KELLY, BALDOCK and BRISCOE, *Circuit Judges*.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX G

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

No. F-2002-0918

ROBERT GRADY JOHNSON,
Appellant,

vs.

THE STATE OF OKLAHOMA,
Appellee.

Appeal from the District Court of
Comanche County
Case No. CRF-84-597

BRIEF OF APPELLANT

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* * * *

had heard to target an unfavorable juror, the trial court removed the targeted juror from the panel. The court refused every jury instruction offered by Mr. Johnson's counsel even though they were legally correct, and allowed the prosecutor to tell jurors that those of them who would not vote for the death penalty were "weak."

Quite simply, Mr. Johnson was thwarted at every turn in his efforts to present his defense, while the prosecution was essentially allowed to make up the rules as it went along. The result was a trial that cannot possibly be described as fair. Mr. Johnson was deprived of his constitutional right to a fair trial, and for all of these reasons, as documented more fully below, he respectfully requests that this Court vacate his convictions and sentence.

ARGUMENT

PROPOSITION I

Mr. Johnson's Felony Murder Convictions Must be Reversed Because the State Did Not Prove Mr. Johnson Was Present and Participating in the Robbery at the Time the Deaths Occurred.

The plain language of the Oklahoma felony murder statute and all of the relevant Oklahoma case law makes clear that a defendant must be present and participating in a felony in order to be convicted of felony murder. Because no reasonable jury could find beyond a reasonable doubt that Mr. Johnson was present and participating in the robbery of the Geronimo Bank, the trial court should have granted Mr. Johnson a directed verdict on the felony murder charges.

The only evidence that even remotely suggests that anyone other than Jay Neill participated in the robbery at the Geronimo Bank is Marilyn Roach's testimony that she heard two different voices in the bank immediately after she was shot twice in the head, and that during that same time, she heard the voice of God who referred to the perpetrator of the crime in the plural form. (Tr. at 1354-56, 1363). While this Court does not typically make determinations regarding the credibility of witnesses, in the case of Marilyn Roach, no reasonable jury could have found that Johnson was in the bank at the time of the robbery on the basis of Roach's testimony. *See United States v. White*, 673 F.2d 299, 301 (10th Cir. 1982) (while it is the jury's right to determine credibility and find facts, the court can enter a judgment of acquittal if evidence that defendant committed the crime is so meager that no reasonable jury could find guilt beyond a reasonable doubt).

Ms. Roach testified that she lost consciousness at least temporarily after being shot. (Tr. at 1356). In addition, she testified that one of the bullets penetrated her brain so deeply that surgeons could not remove it for fear of doing more harm. Another bullet damaged one of her ears. (Tr. at 1358). Moreover, neither of the other two surviving witnesses at the bank (who never lost consciousness) heard the two voices that Ms. Roach believes she heard. (0. R., File 9, pg. 1362). Ms. Roach also testified previously that it was possible that what she overheard was actually a conversation between these two witnesses. (Tr. at 1368-69). The FBI agent who interviewed Ms. Roach and the other survivors concluded that she was "hallucinating." (0. R., File 9, pg. 1337).

Even assuming that a reasonable jury could credit Roach's testimony as to what she heard immediately after being shot twice in the head, Roach did not identify the second voice as that of Mr. Johnson, nor did she claim to have seen Mr. Johnson in the bank. In fact, no witnesses place Mr. Johnson anywhere in Geronimo on the day of the robbery. Both Bellen Robles and Ruben Robles testified that while they had a nearly complete view of the bank, they saw only one robber, whom they positively identified as Jay Neill. (Tr. at 1329,1345-46). There was also no physical or forensic evidence placing Mr. Johnson at or near the crime scene, while blood, fibers and hair from the victims were found on a knife in Neill's car and blood from the victims was found on Neill's wristwatch and tennis shoe. (Tr. at 1538, 1539-41).

Finally, three separate witnesses, along with airline computer records, place Mr. Johnson at his neighbor's apartment shortly before the robbery. Through expert testimony, Mr. Johnson established that it was, practically speaking, impossible for him to have been at Geronimo Bank at the time of the robbery. Telephone records show that an employee from the Geronimo Bank called the bank in Florida at 1:15 p.m. on December 14. (Tr. at 1382). Anna Yampanis, an employee at the Florida bank, testified that on December 14, 1984 at 1:15 p.m., she received a call from Kay Bruno at the Geronimo Bank inquiring about a check payable to Jay Wesley Neill. (Tr. at 1279).

Debbie Ward testified that Mr. Johnson was in her apartment, without any shoes on, in Lawton, Oklahoma until 1:00 or "a little before," and that he then left her apartment going toward his own apartment. (Tr. at 1155). In her previous testimony at Jay Neill's

trial, Ms. Ward testified that Mr. Johnson was with her in her apartment until two or three minutes after 1:00. (Tr. at 1427). Dr. Brad Davis, a mathematics professor at Cameron University, testified that in order for him to drive from Mr. Johnson's apartment in Lawton to the Geronimo Bank in fifteen minutes, he would have had to have driven at least 93 miles per hour in the 55 miles per hour zones. (Tr. at 1796).

In sum, the State's entire case was based on its bare assertion that it may have been *possible* to infer that a second person was in the bank and that it was *possible* that that second person was Mr. Johnson. The Supreme Court of Kansas considered and rejected a virtually identical argument in *State v. Williams*, 630 P.2d 694 (Kan. 1981). In *Williams*, the court summarized the State's argument as follows: "The unproved supposition of the State . . . is that because the decedent's body was found lying on her back with arms at her sides, with no defensive marks on the decedent's hands or arms, the perpetrator of the crime . . . must of necessity have had an accomplice with him at the time of the commission of the crime." *Id.* at 701. Unlike in this case, in *Williams,* the State even introduced laboratory blood and semen tests that tended to corroborate the defendant's presence at the crime scene. *Id.* Despite this, the court noted that while circumstantial evidence was consistent with the State's theory, it was also consistent with the theory that only one person was involved. *Id.* at 702. Because of this and because there was insufficient evidence to conclude that the second individual, if any, was the defendant, the court held that the defendant was entitled to acquittal as a matter of law. *Id.*

The State's case against Mr. Johnson was based on even less evidence than in *Williams*. No reasonable jury could have found that Mr. Johnson was present at the time of the robbery and murders at the Geronimo Bank on the basis of the evidence presented at his trial. Even though the evidence clearly establishes that Mr. Johnson was not present when the crimes occurred, the trial court refused to grant Mr. Johnson's motion for a judgment of acquittal as a matter of law. (Tr. at 2290-91, 94). This was error.

At the time of Mr. Johnson's crime and his conviction, the Oklahoma felony murder rule provided:

> A person . . . commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of . . . robbery with a dangerous weapon . . .

21 OK. ST. § 701.7(B) (1991) (emphasis added).

One year before Mr. Johnson's trial, this Court emphasized that "to find appellant guilty of felony murder the homicide must have occurred while appellant was in the commission of the robbery." *Stiles v. State*, 829 P.2d 984, 991 (Okl. Cr. 1992) (emphasis added). Even prior to the *Stiles* case, Oklahoma courts had long interpreted the plain language of the felony murder rule in effect at the relevant time as requiring that the defendant be actively participating in the underlying felony at the time the deaths occurred. Thus, in *Franks v. State*, 636 P.2d 361, 365 (Okl. Cr. 1981), this Court held: "At the time of the killing, the accused must be engaged in some act which is required for the full execution of that underlying crime, and the killing must be the consequence of that crime," *overruled on other grounds, Brown v. State*, 743 P.2d 133 (Okl. Cr. 1987).

Similarly, in *Diaz v. State*, 728 P.2d 503, 509 (Okl. Cr. 1986), the Court asserted that "at the time of the homicide, the accused must be engaged in some act which is required to complete the underlying felony."

In view of this requirement, Oklahoma courts have extended the felony murder rule to non-triggermen only where there is evidence that the non-triggerman was present at the crime scene and actively participating in the underlying felony (or fleeing from the scene) at the time the death occurred. There are no reported cases applying Oklahoma's felony murder statute to a non-triggerman who was not present at the immediate vicinity of the crime scene at the time the deaths occurred.

In *McDonald v. State*, 674 P.2d 1154, 1155 (Okl. Cr. 1984), for example, the Court stressed that "the appellant actively participated in the attempted robbery." *Id. See also, e.g., Banks v. State*, 43 P.3d 390, 397 (Okl. Cr. 2002) (there was sufficient evidence to support felony murder conviction because defendant was present when victim was kidnapped, raped and murdered); *Spears v. State*, 900 P.2d 431, 439 (Okl. Cr. 1995) (defendant's participation in victim's murder and direction of disposition of the victim's truck satisfied participation requirement of felony murder); *Crawford v. State*, 840 P.2d 627, 631-32 (Okl. Cr. 1992) (there was sufficient evidence for a rational trier of fact to convict defendant of felony murder where defendant admitted to burglarizing victim's home, kidnapping her, and leaving her in the trunk of a car); *Fowler v. State*, 779 P.2d 580, 585 (Okl. Cr. 1989) (physical evidence placed defendant at the scene); *McDonald v. State*, 674 P.2d 1154, 1155 (Okl.. Cr. 1984) (there was sufficient evidence to convict defendant of felony murder where witness testified

that defendant jumped over a restaurant's counter, pointed a gun at two employees, and ordered them into a rear storeroom); *Bell v. State*, 527 P.2d 344, 345-46 (Okl. Cr. 1974) (Defendant joined with co-defendant in armed break-in that resulted in death of victim).

It is true that, under 21 Ok. St. § 172, a defendant who aids and abets in a crime is guilty as a principal of that crime whether or not he is present at the scene. Under this rule, a defendant who plans a bank robbery can be liable for bank robbery whether or not he is there. This Court, however, has correctly held that this rule cannot be aggregated with the felony murder rule to allow a conviction for felony murder when the defendant was not present during the commission of the underlying felony. *Anderson v. State*, 91 P.2d 794, 797 (Okl. Cr. 1939). In *Anderson*, the Court held that in order for an aider and abettor to be convicted for a homicide that results from the felony, the accused must have been "present" during the commission of the felony and "aiding and abetting another in its commission." *Id.* As a result, even though there was evidence in *Anderson* that the defendant supplied the killer with a loaded pistol, the Court reversed his murder conviction because "the testimony of the state's own witnesses was that [the defendant] did not raise his hand or do a single act to aid or abet or assist the [killer] at the time of the actual killing." *Id.*

If an individual intends death, of course, he may be found guilty of murder with malice regardless of his whereabouts. *See Torres v. State*, 962 P.2d 3, 15 (Old. Cr. 1998). But that is a theory that Mr. Johnson's jury rejected in this case.

Nor can the State rely on the general rule of Oklahoma conspiracy law that "[w]hen a conspiracy is entered into to do an unlawful act, all persons who engage therein are responsible for all that is done in pursuance thereof by any of their [co]conspirators until the object for which the conspiracy was entered into [has been] fully accomplished." *Bell*, 527 P.2d at 346. This rule may properly be applied to support the introduction of a conspirator's testimony against his coconspirators. *Jemison v. State*, 633 P.2d 753, 755-56 (Okl. Cr. 1981) (the driver of a getaway vehicle was liable for armed robbery along with the actual robbers); (*Fox v. State*, 524 P.2d 60, 63 (Okl. Cr. 1974)), and even to support the conviction for murder with malice aforethought of a defendant who pays a hit man to carry out a murder plot *(Huckaby v. State*, 804 P.2d 447, 452 (Okl. Cr. 1990)). There is no suggestion in any of these cases, however, that the rule can be used to supercede the plain language of the Oklahoma felony murder statute—which unmistakably provides that in order to be convicted of felony murder the defendant himself must be "in the commission of the underlying felony at the time the death occurs. 21 Ok. St. § 710.7(B) (1991).

To the contrary, in the felony murder context, the rule has always been interpreted as applying only to persons who actually "engage" in the underlying felony. Thus, in *Holmes v. State*, 119 P. 430, 440 (Okl. Cr. 1911) (emphasis added), the Court summarized the principle as follows:

> The principle involved is that where parties voluntarily act together in the commission of an offense which may result in death to another, and such death does ensue therefrom, all such parties so acting together are just as guilty of

> murder as though they had intended the death of such party.

In *Ex Parte Finney*, 205 P. 197, 202 (Okl. Cr. 1922), the Court held that each person "engaged" in an unlawful arrest could be held responsible for two murders committed during the course of the arrest. The Court reasoned:

> If this attempted arrest was unlawful and without justification, each person participating will be held responsible for the illegal acts of the others done pursuant to a common criminal design . . . . If two or more persons join in a purpose to commit a crime (in this case an illegal arrest), each of them, if present, is guilty as principal of any other crime committed by the others in pursuance of the common purpose or as a natural or probable consequence thereof.

See also Oxendine v. State, 350 P.2d 606, 612 (Okl. Cr. 1960) (deaths must have occurred "while said defendants were conjointly engaged in the commission of any felony") (emphasis added);

In *Turner v. State*, 477 P.2d 76 (Okl. Cr. 1970), this Court summarized the rationale of the requirement that one convicted of felony murder must actually be present and participating in the underlying felony by saying, "It may be stated as a general proposition that no one can be properly convicted of a crime to the commission of which he has never expressly or impliedly given his assent. To hold otherwise would be contrary to natural right and shocking to every sense of justice and humanity." *Id.* at 84. The Court held that in the context of felony murder, assent can be inferred from the defendant's participation in an underlying felony where "the accused is present and

aiding and abetting another in its commission." *Id.* In *Turner*, the Court reversed the defendant's murder conviction because "the evidence from the State's own eyewitnesses was that the defendant did nothing to encourage, aid, or abet, or assist the codefendant at the time of the actual killing." *Id.* at 80.

In view of this unbroken line of authority, the Oklahoma felony murder statute could not constitutionally be applied to Mr. Johnson, even assuming that the statute were susceptible to a broader interpretation. It is well established that a criminal statute must be clear and specific, and must spell out in advance the conduct to which it applies. *See, e.g., Wright v. Georgia*, 373 U.S. 284, 83 S. Ct. 1240, 10 L.Ed.2d 349 (1963). Due process requires that a defendant have adequate notice of the penalties that attach to his conduct. *Id. See also Gall v. Parker*, 231 F.3d 265, 305 (6th Cir. 2000) (just as "the *ex post facto* clause precludes state legislatures from retroactively altering the definitions of crimes . . . state supreme courts are 'barred by the Due Process Clause from achieving precisely the same result by judicial construction.") (citations omitted); *Devine v. New Mexico Dep't. of Corrections*, 866 F.2d 339, 345 (10th Cir. 1989) (retroactive application of law by unforeseeable judicial interpretation violated due process). To hold for the first time in Oklahoma history—in the face of the plain language of the Oklahoma felony murder statute and contrary to all of the cases construing that statute—that a defendant can be convicted of felony murder without proof that he was actively engaged in the commission of the underlying felony would clearly violate these principles. *See also United States v. Bass*, 404 U.S. 336, 347-48, 92 S. Ct. 515, 30 L.Ed.2d 488 (1971) (rule of lenity).

Thus, under well established Oklahoma law, as well as bedrock principles of the United States Constitution, Mr. Johnson was not eligible for a felony murder conviction unless the evidence showed beyond a reasonable doubt that he was present and participating in the Geronimo Bank murders at the time the deaths occurred. The record in this case shows just the contrary. According to the FBI and all of the evidence, Mr. Johnson was not present or participating in the Geronimo Bank robbery, and is therefore innocent of the felony murder charges for which he is serving four life sentences. The judgments of conviction should be reversed, and judgments of acquittal entered on all four of the murder charges.

PROPOSITION II

Mr. Johnson's Constitutional Right to a Fair Trial Was Violated When the Court Refused To Instruct the Jury that a Defendant Must Have Been Present and Participating at the Time of Death to Be Guilty of Felony Murder.

Even assuming that there was sufficient evidence of Mr. Johnson's presence at the bank to raise a triable issue—and for the reasons noted above there was not—the case should nonetheless be reversed. The instructions given by the, trial court failed to accurately apprise the jury that it must find that Mr. Johnson was present when the deaths occurred to convict him of felony murder. To determine whether jury instructions were proper, this Court considers whether the instructions as a whole fairly and accurately state the law. *Norton v. State*, 43 P.3d 404, 409 (Okl. Cr. 2002).

As discussed above, the plain language of the Oklahoma felony murder statute, as well as all relevant case law, does not allow a defendant to be convicted of felony murder when he neither intended death nor was present and participating at the scene when the deaths occurred. Mr. Johnson requested that the court instruct the jury that it must find that he was present and participating in the robbery of the Geronimo Bank at the time of the deaths in order to convict him of felony murder. (Tr. at 2290-93). Even though this is a requirement under the plain language of the felony murder statute and applicable case law, the court refused. This refusal denied Mr. Johnson his Fourteenth Amendment right to a fair trial and resulted in his wrongful conviction. Consequently, his convictions should be vacated, and the case remanded for a new trial under proper instructions. Neill at 12:55 p.m., and Ms. Donahue testified that she spent another forty-five minutes to an hour after that with Neill making hotel and limousine arrangements. (Tr. at 1165, 1168).

The trial court's refusal to allow the defense to confront Mr. Murphy with this clear contradiction was constitutional error. Ms. Donahue's testimony was clear and specific, and if it was true, Mr. Murphy's could not be. The defense was entitled to rely on this testimony, and it was entitled to confront Mr. Murphy with it to test his own credibility. To the extent the State wished to rely on other portions of Ms. Donahue's testimony—where she offered rough approximations that could arguably be reconciled with Mr. Murphy's testimony—the State would have been free to do so on redirect. But that is not what happened here. The trial court essentially directed a verdict for the prosecution on a key, contested issue, by siding with Ms. Donahue's rough approximations

in response to generalized questioning, in preference to her precise estimates in response to specific questioning. In the process, the trial court deprived Mr. Johnson of the best means available of undermining the principal "planning" witness against him.

PROPOSITION V

Mr. Johnson's Right to a Fair Trial Was Violated When the Court Refused to Allow his Counsel to Refresh Debbie Ward's Recollection with her Prior Testimony.

The trial court likewise deprived Mr. Johnson of his rights to confrontation and due process by refusing to allow his counsel to refresh Debbie Ward's recollection with her own sworn testimony in the trial of Jay Neill. This was a vital point going to the central issue of whether there was any realistic prospect that Mr. Johnson could have been at the bank at the time of the crime. Nonetheless, Mr. Johnson's rights under Oklahoma law and the Fifth and Sixth Amendments to the United States Constitutions were unfairly cut off in their entirety.

"It is elementary that the memory of a witness may be refreshed by calling his attention to a proper writing or memorandum." *Putnam v. United States*, 162 U.S. 687, 694, 16 S. Ct. 923, 926, 40 L.Ed. 1118 (1896). *See also, e.g., Morris v. State*, 247 P. 418, 420 (Okl. Cr. 1926). Anything, even inadmissible evidence, may be used to refresh a witness' recollection. *United States v. Weller*, 238 F.3d 1215, 1221 (2001). Moreover, prior inconsistent statements made during a trial can be used as substantive evidence of guilt or innocence. 12 OK. ST. §2801(4)(a)(1); *Omalza v. State*, 911 P.2d 286, 305 (OkI. Cr. 1995).

It is undisputed that after Mr. Johnson concluded his phone call with Denise Donahue in Debbie Ward's apartment, he and Debbie Ward left her apartment together. (Tr. at 1424). He went back into his apartment across the hall, and she returned to work. (Tr. at 1423-24). In the trial of Jay Neill, Debbie Ward testified that she left her apartment about two or three minutes after 1:00 p.m. on the day of the Geronimo Bank murders. (Tr. at 1434-35). This would mean that Mr. Johnson was still at the Tanglewood Apartments at that time, less than 13 minutes before Jay Neill entered the Geronimo Bank, over sixteen miles away.

At Mr. Johnson's trial, Debbie Ward testified that "it was real close to 1:00" when they left her apartment. (Tr. at 1427). On cross-examination, Mr. Johnson's counsel asked Ms. Ward about her prior testimony at Jay Neill's trial, in which she stated that they had left her apartment two or three minutes *after* 1:00. (Tr. at 1435). She stated that she could not recall her testimony, and Mr. Johnson's counsel asked if it would refresh her recollection to view the transcript of her previous testimony. (Tr. at 1435). Ms. Ward said that it would. (Tr. at 1435). The State then objected on the basis that Ms. Ward had no independent recollection. The trial court would not allow defense counsel to refresh Ms. Ward's recollection and would not even hear him on the issue or explain his ruling. (Tr. at 1435-36).

This was constitutional error. The fact that a witness states that she cannot recall her previous testimony is not a bar to refreshing her recollection. Indeed, it is the basic predicate justifying the practice of refreshing recollection. *See Neal v. State*, 837 P.2d 919, 921 (Okl. Cr. 1992) ("[A]fter the witness stated

that he could not recall giving a prior inconsistent statement appellant was entitled, even without the transcript of the earlier testimony, to confront the witness with the substance of the inconsistent statement."). What time Mr. Johnson left Debbie Ward's apartment was a key fact in establishing that he could not have been at the bank at the time Jay Neill committed the crimes. Since Ms. Ward's inconsistent statement was made at a prior trial, it could have been admitted as substantive evidence that Mr. Johnson was more than sixteen miles away from the Geronimo Bank, less than thirteen minutes before the robbery began. The trial court's refusal to allow Mr. Johnson's counsel to even refresh the recollection of Debbie Ward denied him an opportunity to establish these key facts. This was a violation of Mr. Johnson's Fifth and Sixth Amendment rights. For this reason, Mr. Johnson's convictions should be vacated.

PROPOSITION VI

Mr. Johnson's Right to a Fair Trial Was Violated When the Court Refused to Allow his Expert Witness to Testify to Whether It Would Have Been Possible to Drive a Four-Cylinder Car from Mr. Johnson's Apartment to Geronimo Bank in Seventeen Minutes or Less.

The trial court further thwarted Mr. Johnson's legitimate efforts to prove up his alibi by refusing to allow him to elicit proper opinion testimony from his duly noticed expert. The testimony which defense counsel sought to elicit from Dub Armstrong was not novel, scientific

* * * *

Respectfully submitted,

/s/ [Illegible]
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